Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES J. SIBLEY, SR.,

Petitioner,

versus

RAYWOOD J. LEMAIRE, Sheriff;
HUBERT P. TRAHAN; FREDDIE NOLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES P. LAMBERT
LA Bar Roll No: 7934
CURTIS & LAMBERT
(A Professional Law Corporation)
201 Rue Iberville, Suite 300
Post Office Box 80247
Lafayette, Louisiana 70598-0247
Telephone: (318) 235-1825
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether a claimant under 42 U.S.C. § 1983 is entitled to a jury determination of the defendants' deliberate indifference to his constitutional rights as a pretrial detainee to reasonable medical treatment and protection from self-harm?

LIST OF PARTIES

Petitioner: James J. Sibley, Sr.

Respondents: Sheriff Raywood J. Lemaire; Hubert P. Trahan; Freddie Nolan.

Parent Companies and Subsidiaries: None.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James J. Sibley, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, No. 98-30301, entered on August 24, 1999.

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 184 F.3d 481 and is reprinted herein. (App. 1, *infra.*) The unreported September 23, 1999 denial of petitioner's petition for rehearing and/or rehearing en banc is reprinted herein. (App. 87, *infra.*) The following unreported rulings of the district court are reprinted herein: Judgment entered on March 6, 1997 (App. 19, *infra.*), Memorandum Ruling issued on June 19, 1997 (App. 49, *infra.*), Memorandum Ruling issued on March 10, 1998 (App. 64, *infra.*), and Judgment of Dismissal entered on March 11, 1998 (App. 85, *infra.*).

JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, entered on August 24, 1999. After its entry, petitioner applied for rehearing and/or rehearing en banc. On September 23, 1999, the court of appeal denied the application for rehearing with no member of the panel or judge in regular active service on the court requesting that the court be

polled on rehearing en banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Seventh Amendment to the United States Constitution and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

i) Course of Proceedings and Disposition in Court Below.

Petitioner brought this action under 42 U.S.C. § 1983 and Louisiana Civil Code articles 2315, 2316 and 2320 to recover damages for catastrophic injuries that he suffered on November 27, 1989 while incarcerated as a pretrial detainee in the Vermilion Parish Correctional Center at Abbeville, Louisiana. Petitioner is totally blind as a result of gouging out his eyes with his fingers while in an untreated and ineffectively monitored psychotic state.

Petitioner asserted individual capacity claims against Chief Deputy Hubert Trahan, and Jailer Supervisor Freddie Nolan and official capacity claims against Sheriff Raywood Lemaire and Chief Deputy Trahan. Following a nine day jury trial in September of 1996, the trial judge first denied defendants' motion under Rule 50 for a Judgment as a Matter of Law. The civil jury returned interrogatories, finding with respect to the § 1983 claims that Deputy Nolan was not liable, but that Sheriff Lemaire

and Chief Deputy Trahan were guilty of violating Petitioner's constitutional rights to reasonable medical care and protection from self harm. Chief Deputy Trahan, prison warden, was found liable in his individual capacity and in his official capacity as a policymaker for the sheriff with respect to the operation of the jail. Sheriff Lemaire was found liable in his official capacity. All three defendants were found liable with respect to the state law negligence claims. Petitioner was awarded $220,000 in past general damages, $820,000 in future general damages and $10,000 for future medical and rehabilitation costs.

On November 27, 1996, the trial judge issued a comprehensive written Memorandum Ruling and an order denying Chief Deputy Trahan's Motion for a Judgment as a Matter of Law on the grounds of qualified immunity. A written judgment implementing the jury's verdict was subsequently entered on March 7, 1997.

On June 19, 1997, the trial judge issued a written Memorandum Ruling and order granting a new trial on both the § 1983 and state law negligence claims. The defendants' renewed Rule 50 motions challenging the sufficiency of the evidence were denied for the reasons assigned in the district court's November 27, 1996 Memorandum Ruling.

After amending their answer to assert the new defense of the fault of non-parties, the defendants filed a Motion for Summary Judgment relying exclusively on the evidence presented at the trial in support of the motion.

The motion was granted on March 10, 1998, and a Judgment of Dismissal was entered on March 11, 1998, dismissing Petitioner's § 1983 claims and denying his claim for attorney's fees under 42 U.S.C. § 1988 with prejudice. The pendent state law negligence claims were dismissed without prejudice, reserving Petitioner's right to pursue them in state court proceedings.

Petitioner appealed, and the defendants cross-appealed. On August 24, 1999, the court of appeal affirmed the district court's judgment in all respects. Petitioner's timely petition for rehearing was subsequently denied on September 23, 1999.

ii) Statement of Facts.

James Sibley, Sr. has a history of mental illness, which was precipitated by a work-related accident in 1988. On November 22, 1989, his family called the Vermilion Parish Sheriff's Office, because he was exhibiting bizarre, combative behavior. Based on a nominal charge of attempted simple battery, he was taken into protective custody to be medically evaluated and transferred to a mental health facility.

While being held in an isolation cell under solitary confinement, Mr. Sibley was seen by the local coroner and his assistant who instructed jail officials to call immediately should his condition worsen. On Sunday, November 25, 1989, the jailers found him hitting, kicking, or banging his head on his cell door. Concerned that Mr. Sibley "might do damage to himself," shift supervisor Deputy Freddie Nolan and Deputy Drew David physically removed him from the area of the cell door and

shackled him to his bed. Both made written reports on the incident.

Mr. Sibley remained continuously shackled to his bed in excess of thirty hours while his mental condition and outward behavior progressively deteriorated. Late Monday afternoon he created a disturbance and began to verbalize hallucinatory fears of the devil in his cell. He was stripped of his jail clothing which he had soiled and was reshackled by Deputy Chuck Landry.

Present throughout the day Monday was Chief Deputy Hubert Trahan whose office was but a few yards from the isolation cells. In addition to first hand knowledge of the situation, Respondent read the reports of Deputy Nolan and most significantly of Deputy David, which (prior to being altered by an unknown source in the Sheriff's department) showed clearly that Petitioner had remained shackled for a prolonged period due to self-harming behavior. There is no dispute that Respondent's authorization was needed for the prolonged physical restraint of Mr. Sibley. At no time Sunday or Monday did Respondent or any staff contact the medical providers.

At 9:30 p.m., a jailer discovered Mr. Sibley engaged in the self-mutilation of his eyes. Deputy Peters found that he had gouged out his left eye and was in the process of attempting to pluck out the right eye. Petitioner was irrational and combative, necessitating application of hand restraints as well as the leg shackles previously employed.

Transport of Petitioner to the hospital did not begin until 10:22 PM. He responded rapidly to an injection of an

anti-psychotic drug, and was then able to calmly cooperate with his treatment. However, the efforts to save his eyes were unsuccessful, and he remains totally blind.

Due to his delusionary state at the time of this tragic incident, Petitioner was unable to give eye witness testimony of the events leading to his self-mutilation at his trial. Instead he relied chiefly on the singularly courageous testimony of the one deputy who broke with the line taken by Chief Deputy Trahan and the other deputies. While the others feigned ignorance of the length and extent of the shackling and the escalating behavior of petitioner, Deputy Chuck Landry related the simple truth which he had seen, heard, and in which he participated. After hearing this testimony and examining the incriminating written statement of Deputy David which had been altered in an attempt to soften its impact, the jury found that respondents were guilty of deliberate indifference in their failure to summon proper medical providers and to protect petitioner from self-harm.

REASONS FOR GRANTING THE WRIT

The court of appeals' holding that petitioner was not entitled to a jury finding on the issue of the defendants' subjective deliberate indifference conflicts with decisions of every other United States court of appeals. Every other circuit has held that deliberate indifference is a factual issue that is appropriate for jury determination.[1] Prior

[1] *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998); *Weyant v. Okst*, 101 F.3d 845 (2nd Cir. 1996); *Pope v. Shafer*, 86 F.3d 90 (7th

decisions of the Fifth Circuit Court of Appeals have likewise held that a jury finding on subjective deliberate indifference is proper in a § 1983 action.[2] In this case, however, the Fifth Circuit Court of Appeals held that the district court had erred in allowing a jury to make the determination of subjective deliberate indifference in light of its en banc decision in *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997).

Petitioner acknowledged at trial that his claims stemmed from an "episodic act or omission" rather than a general condition of confinement, and they were handled accordingly by the district court. The jury was instructed under the court of appeals' prior ruling in *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc) that it was required to find subjective deliberate indifference in order to hold the defendants liable.[3] However, the court

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Cir. 1996); *Taylor v. Michigan Dept. of Corrections*, 69 F.3d 76 (6th Cir. 1995); *Consolo v. George*, 58 F.3d 791 (1st Cir. 1995), *cert. denied*, 516 U.S. 990 (1995); *San Filippo v. Bongiovanni*, 30 F.3d 424 (5th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992); *Simkus v. Granger*, 940 F.2d 653 (4th Cir. 1991); *Ware v. Unified School Dist. No. 492, Butler County, State of Kan.*, 902 F.2d 815 (10th Cir. 1990), *opinion modified and reh'g denied*, 902 F.2d 815 (10th Cir. 1990); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

[2] *Lewis v. Parish of Terrebonne*, 894 F.2d 142 (5th Cir. 1990), *reh'g denied*, 901 F.2d 1110 (5th Cir. 1990); *Partridge v. Two Unknown Police Officers of City of Houston, Tex.*, 751 F.2d 1448 (5th Cir. 1985), *opinion withdrawn by*, 755 F.2d 1126 (5th Cir. 1985), *opinion superseded by* 791 F.2d 1182 (5th Cir. 1986).

[3] The trial judge instructed the jury that petitioner was required to prove that "the defendants *intentionally* committed acts which operated to deprive the plaintiff, Mr. Sibley, of a right secured by the Constitution of the United States. . . . " Later, the

of appeals concluded that the trial judge had erred in submitting the issue of subjective deliberate indifference to the jury, holding:

> In light of our en banc decision [in *Scott v. Moore*], the district court therefore correctly concluded that, in this case, it was error to submit the amorphous question of whether the prison's policy was reasonably related to a legitimate government objective to a jury. *Instead, the court first had to determine that, based on the record before it, a specific employee had acted with deliberate indifference to Sibley's medical condition.* We therefore find no error in the district court's conclusion that this error required a new trial on the § 1983 claim. [Emphasis added.]

The court of appeals' holding that petitioner's Seventh Amendment right to a jury trial does not extend to the issue of whether an official acted with subjective deliberate indifference is particularly troubling in light of the underlying disputed factual issues in this case. Whether or not the defendants knowingly denied petitioner the medical treatment and protection from self-harm that he desperately needed depends in large part on what his behavior was like in the hours preceding the act

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trial court charged the jury that petitioner must prove by a preponderance of the evidence "that the defendants displayed deliberate indifference to an illness or an injury of the plaintiff. . . . " In explaining the concept of deliberate indifference, the trial court reiterated that it was "to be evaluated by a *subjective* analysis of the states of mind of Chief Deputy Hubert Trahan and Jailer Supervisor Deputy Freddie Nolan" and that in order to hold the defendants liable the jury had to "find that they acted deliberately, which means to act intentionally." [Vol.16, pp. 40-42]

of self-mutilation. The majority of the trial was devoted to presenting conflicting evidence on this issue. As this Court observed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 1644 (1999), "[i]n actions at law predominantly factual issues are in most cases allocated to the jury."

The trial judge recognized that the underlying facts were disputed in ruling on the defendants' Rule 50 motions. When the trial court denied the defendants' motion for a Judgment as Matter of Law for the third time, it found that the evidence was conflicting with regard to the length of time that petitioner remained shackled, how often the jailers checked on him, and whether his behavior escalated and became more bizarre after he was last seen by a doctor.[4]

The trial court also adhered to its initial ruling on Chief Deputy Trahan's plea of qualified immunity in which it held:

> The jury, in making its credibility judgments and reasonable inferences, could have concluded upon the basis of the expert testimony, the policy testimony of the Sheriff and Trahan, the altered departmental report discussed by Deputy David, and the negative testimony and omissions evidenced by testimony as inferring deliberate manipulation of the internal reporting process, that plaintiff's behavior was much more demonstrative and bizarre than the defendants and other deputies' testimony would indicate. If the jury made such a determination, knowledge of such behavior on the part of

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[4] June 19, 1997 Memorandum Ruling, App. 54, *infra*.

> Trahan and his lack of response to it could have led a reasonable jury to conclude that Trahan acted with deliberate indifference to a substantial risk of harm to the plaintiff.[5]

As these findings indicate, the record is replete with evidence linking Chief Deputy Trahan to petitioner's treatment at the jail. Trahan's office is located only a short distance from the isolation cell where petitioner was confined, and he admitted that he went to the jail for some period of time every day of petitioner's incarceration. While he was there, he reviewed paperwork, conferred with his staff and got regular reports from the head jailers about what was going on in his prison. According to Sheriff Lemaire, while other subordinates might have made the original decision to place petitioner in isolation, Chief Deputy Trahan's approval was needed to maintain him there. As a result of his daily presence at the jail, Trahan was aware that petitioner had been seen by the corner and the assistant coroner after his initial incarceration. He admitted that the deputies should not have planned to keep petitioner shackled for five to six hours, as Deputy David's original, unaltered report indicated.[6]

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[5] Vol.5, pp.598-99.

[6] The report originally stated that "Sibley *remained* under restraint until relief *was made* with the oncoming shift." It was later altered to read "Sibley *will remain* under restraints until relief *is made* with the oncoming shift." The change to the future tense made it possible for Chief Deputy Trahan to feign ignorance of the prolonged shackling and to dismiss the statement as a plan that was never implemented when he testified under cross examination in petitioner's case. The alteration was brought to the jury's attention after Trahan testified, but the defendants elected not to present further testimony on this point during their case.

The original written statement provides ample evidence that Chief Deputy Trahan knew about the prolonged shackling. The jury could have based its finding upon the evidence that petitioner had remained shackled not only through the end of Deputy David's shift, but also through subsequent shifts for a total period of in excess of thirty hours. As recognized by the trial judge, the jury could also have reasonably concluded that the prolonged shackling was a response to petitioner's increasingly bizarre and dangerous behavior, which was far worse than admitted by respondents and their subordinates.

Trahan's involvement is particularly significant in light of the district court's finding that he had ultimate policymaking authority regarding the operation of the jail.[7] In addition to supporting petitioner's individual capacity claim against Trahan, it formed the basis for Sheriff Lemaire's liability. Under the settled jurisprudence of the court of appeals, even a single act by an official with final policymaking authority regarding the act in question constitutes the policy of the local governmental entity.[8]

The finding that Trahan was a policymaker was appropriately made by the trial judge. However, "[o]nce

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[7] That finding is amply supported by the sheriff's candid testimony that he was not a "micromanager" and that he left the daily operation of the jail to his chief deputy.

[8] *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 873 (1999); *Brooks v. George County, Miss.*, 84 F.3d 157 (5th Cir. 1996); *Brown v. Bryan County, Okl.*, 67 F.3d 1174, 1183 (5th Cir. 1995), *vacated on other grounds*, 520 U.S. 397 (1997).

those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively commanded that it occur . . . or by acquiescence in a longstanding practice or custom which constitutes 'standard operating procedure' of the local governmental entity." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 736 (1989). The court of appeals' holding that the jury was not entitled to make that determination in this case is contrary to this Court's decisions and the decisions of every other circuit.

CONCLUSION

This case vividly illustrates the extreme difficulty that a pretrial detainee faces in establishing the facts surrounding his incarceration when all of the evidence is controlled and subject to manipulation by his opposition. In addition to affirming the denial of petitioner's Seventh Amendment right to have a jury sort through the contradictions and coverups to determine the truth, the court of appeals' decision conflicts with this Court's decisions and a unanimous line of contrary circuit court of appeals' decisions. Taking the issue of deliberate indifference from the jury will effectively deny pretrial detainees the right to a jury trial in § 1983 cases.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

CURTIS & LAMBERT
(A Professional Law Corporation)
JAMES P. LAMBERT
201 Rue Iberville, Suite 300
Post Office Box 80247
Lafayette, Louisiana 70598-0247
Telephone: (318) 235-1825
Counsel of Record

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30301

JAMES J. SIBLEY, SR.,

Plaintiff – Appellant-Cross-Appellee,

versus

RAYWOOD J. LEMAIRE, Sheriff;
HUBERT P. TRAHAN; FREDDIE NOLAN,

Defendants – Appellees-Cross-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before REAVLEY, JOLLY and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

James J. Sibley appeals the dismissal of his claims that officers operating the Vermillion Parish Correctional Center ("prison") were liable for horrible injuries he inflicted on himself while a pretrial detainee. Sibley was arrested for assault and battery. He underwent a psychotic episode while being detained in an isolation cell. During this psychotic episode he physically blinded himself by plucking out his eyes. For this injury, he sued the sheriff, chief deputy, and a deputy under both 42 U.S.C. § 1983 and Louisiana negligence claims. He won a jury verdict. The defendants then moved for a judgment as a matter of law ("JML") or new trial. The district court initially denied the motions, but then reconsidered in the

light of two newly released opinions and granted a new trial. The defendants then moved for summary judgment. The district court granted the motion for summary judgment on the § 1983 claims and dismissed without prejudice the remaining state claims. Sibley appeals the district court's rulings and the judgment dismissing his complaint. The defendants cross-appeal, arguing that the district court should have granted a JML instead of a new trial and that they were entitled to a JML on the state negligence claims. Finding no error on the part of the district court, we affirm.

I

As we have indicated, this case involves the particularly bizarre and shocking injuries Sibley inflicted upon himself during a psychotic episode while detained at the Vermillion Parish Correctional Center. Sibley was arrested on November 22, 1990, when the sheriff's department responded to a complaint made by Sibley's father-in-law. At the time he was arrested, his relatives pressed charges but requested that the charges be dropped as soon as he received medical attention. At that point, Sibley had developed severe psychological problems, which were exacerbated by his not taking prescribed medication. It is unclear the extent to which the sheriff's department was informed of his history of mental problems.

At the correctional center, Sibley was placed in a holding cell and then, after erratic behavior, he was placed in an isolation cell. Sibley could only be observed by looking through a slot in the door. There was no

closed circuit camera in the room. The district court concluded at trial that there was evidence that Sheriff Lemaire, who was in charge of the correctional center, had a policy of placing violent prisoners in the isolation cell and, if necessary, placing them in shackles. There was also evidence that prisoners with mental problems who exhibited violent behavior were not treated differently from other violent prisoners. The evidence at trial further shows that Lemaire instituted a policy whereby prisoners in isolation cells were to be checked every ten to fifteen minutes.

The Parish Coroner, Dr. Ardley Hebert, examined Sibley on November 23, and concluded that he should be transferred to Acadiana Mental Health ("AMH"). Because AMH did not have any available beds, Dr. Hebert put Sibley on the waiting list and left him at the correctional institute.

On November 24, Deputy Nolan notified the correctional center's nurse that Sibley needed to see a doctor. Dr. Brian Amy, who was taking calls for Dr. Hebert, examined Sibley and also concluded that he should be transferred to AMH. Again, there were no beds available and Dr. Amy therefore left Sibley on the waiting list. During his visit, Dr. Amy filled out a Physician's Emergency Commitment form ("PEC").

Dr. Amy's notes on the PEC are telling. He noted that Sibley could be having delusions. In the section querying whether the patient is homicidal, suicidal, or violent, Dr. Amy wrote, "patient not violent on exam, did get arrested for battery." In dictated notes from his visit, Dr. Amy further noted: "I was called to see patient at the jail

for grossly bizarre behavior. On arrival, patient was pacing around his cell reading an upside down Bible with photographs lined up on the bed like he was holding services. Patient had a very bizarre affect." In a handwritten note at the bottom of the copy of Dr. Amy's typewritten, dictated notes, he wrote in hand: "He is on the list at Acadiana Mental Health & *really* needs to go there."

Dr. Amy left with instructions that he should be called if necessary. Sibley concedes that, up to that point, "[a]lthough [his] conduct was strange and indecorous, there was no suggestion of any potentially self-harming behavior prior to or during Dr. Amy's visit."

Throughout this time period, Sibley's behavior was erratic – he was observed holding his Bible upside down while appearing to read from it, cleaning the walls of his cell with toilet paper, and lying next to his toilet and staring into it. On Sunday, November 26, Sibley was found kicking the door to his cell. There is a factual dispute about what happened after that. Because of the procedural posture of this case, we present the facts in the light most favorable to Sibley's arguments. The testimony provides the basis for concluding that Sibley was placed in leg shackles and that the shackles were left on him until the evening of Monday, November 27.[1] The reason for placing Sibley in shackles was either to punish him for disruptive behavior or to prevent him from hurting himself.

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[1] Sibley has not alleged a constitutional violation based on being kept in shackles. Nor is there any evidence that Sibley suffered any injury because of the use of shackles.

On Monday, November 27, a deputy discovered that Sibley had urinated on himself and his mattress, thrown his food around, and thrown his Bible and family pictures into the toilet. He was removed to another cell while his cell was cleaned. He was offered a shower but declined one because he apparently believed the devil would come up through the drain. He was then placed back in his cell and left there shackled and nude. A deputy testified that he checked on him at 9:15 p.m. and observed him sitting on his bed chanting. At 9:30 p.m. that evening, the same deputy discovered him plucking his eyes out with his fingers.

There was a delay of approximately an hour before Sibley was transported to a hospital. Deputy Nolan indicated that he believed he needed to speak to Dr. Amy before Sibley was moved and that his efforts to reach him were the cause for the delay. When Sibley was admitted to the hospital, his left eye was completely ruined and his right eye was severely damaged. He has not recovered any sight in his right eye.

The evidence at trial did not link either Lemaire or Trahan to any actions taken with respect to Sibley. Furthermore, there is no evidence in the record that anyone communicated to Lemaire information that might lead them to think that Sibley posed a risk to himself. Nor did Lemaire issue any orders with respect to how Sibley should be treated. Lemaire can therefore only be held responsible for policies that may have led to Sibley's self-mutilation. Similarly, Trahan can only be held responsible for either a policy or his failure to properly supervise the deputies handling Sibley.

With respect to Nolan, there is no evidence that he did anything that physically exacerbated Sibley's condition. Although he did put Sibley in shackles, there is no evidence that the shackles, in and of themselves, brought about Sibley's psychotic episode. Besides applying the shackles to Sibley, Nolan did nothing else that could have had any physical effect on Sibley. There is, however, evidence that he observed Sibley's apparently worsening condition without calling Dr. Amy for additional medical consultation. He therefore can only be liable for neglecting to seek additional medical help for Sibley, in the light of Sibley's increasingly erratic conduct – conduct which arguably led Nolan to shackle Sibley to protect himself from himself.

II

Sibley first filed a claim for damages under 42 U.S.C. § 1983 against Sheriff Lemaire in federal district court in 1990. He asserted that Sheriff Lemaire was responsible for the Vermillion Parish Jail and that Sibley had been denied psychiatric care in violation of the Fourteenth Amendment. He also filed claims in state court asserting negligence claims under Louisiana Civil Code articles 2315, 2316, and 2320 against Sheriff Lemaire and others, including Dr. Hebert, Dr. Amy, and the Vermillion Parish Police Jury.[2] The trial in district court was held in abeyance pending the state court proceedings. By late 1994, all state

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[2] In the state court there were a number of medical review panels that were convened pursuant to Louisiana's Medical Malpractice Act, La. R.S. 40:1299.41 et seq.

court actions against Dr. Hebert, Dr. Amy, and the Police Jury had been dismissed with prejudice.[3]

In 1996, Sibley amended his complaint in district court. In part, the amended complaint alleged that there was a persistent, widespread practice that amounted to a policy of using isolation cells and shackles against patients with mental problems. According to the amended complaint, that policy violated Sibley's right to substantive due process. The complaint also alleged that Lemaire failed to provide constant observation of mental patients or to train the prison staff to recognize symptoms of serious mental illness. Sibley's amended complaint also added Chief Deputy Hubert Trahan and Deputy Nolan as defendants. Sibley also successfully moved to consolidate the Louisiana state claims with the § 1983 claims. The case was tried to a jury in September 1996.

Thus, the federal trial proceeded against Sheriff Lemaire and his two deputies Trahan and Nolan. At the close of Sibley's evidence, Lemaire moved for a JML under Fed.R.Civ.P. Rule 50(a), in part requesting dismissal of the policymaker claims. The district court held that the written and/or customary policy of using the isolation cell for disruptive inmates, including mentally ill inmates, was not unconstitutional on its face but could nonetheless be unconstitutional as applied. The district court concluded that whether there was a policy that was unconstitutional as applied was a matter for the jury to

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[3] Dr. Hebert was removed from the suit because he was bankrupt, Dr. Amy prevailed on the merits, and the Vermilion [sic] Parish Police Jury settled.

decide and deferred ruling on the motion. At the close of testimony, Lemaire again renewed his motion and the district court again deferred ruling. At that time, Trahan and Nolan moved for a determination of qualified immunity. The district court deferred ruling on the motion.[4]

The jury decided in Sibley's favor with respect to Chief Trahan and Sheriff Lemaire on the § 1983 claims. The jury found that Nolan was not liable under the § 1983 claims. The jury further decided in Sibley's favor with respect to all of the defendants on the Louisiana negligence claims. The jury found that Lemaire helped "develop a governmental custom, policy, ordinance, regulation or decision that violated . . . Sibley's constitutional rights." The district court entered judgment on March 7, 1997. On June 19, 1997, the district court denied Lemaire, Trahan, and Nolan's rule 50 and rule 59 motions.

On March 17, 1997, the defendants filed a post-trial motion for a JML or for a new trial or remittitur. On June 19, 1997, the district court granted a new trial based on our en banc decision in *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997), and on a recent Louisiana Supreme Court decision, *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180 (La. 1997). The defendants then moved for summary judgment on the § 1983 claims in the subsequent proceedings, and the district court granted the motion, dismissing the state claims without prejudice.

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[4] On November 27, 1996, the trial judge denied Trahan's motion for a JML on the basis of qualified immunity, concluding that a jury could reasonably conclude that Trahan reacted with deliberate indifference to Sibley's worsening condition.

III

At the outset, we note that resolving this appeal is greatly complicated by the quite unusual procedural posture of the case. The case went through a complete trial at the end of which the district court granted a motion for a new trial (denying a motion for a judgment as a matter of law in the process) only to then grant summary judgment. Both sides now take full advantage of the lengthy procedural history of the case to point out numerous perceived errors along the way. Sibley argues that the district court erred by granting a new trial or, failing that, by granting the motion for summary judgment that finally terminated the case. The defendants argue that the district court erred in failing to grant its various motions for judgment as a matter of law, for permitting various errors during the course of the trial, and in not also granting summary judgment on grounds other than those the district court did rely on in disposing of the case.

We address only those issues necessary to resolve this case as expediently as possible. Those issues are: (1) whether the district court erred in granting the defendant's motion for a new trial; (2) whether the district court erred in granting summary judgment for the defendants on the § 1983 claims; and (3) whether the district court abused its discretion in dismissing the remaining state claims without prejudice. We hold that the district court did not err in granting a new trial. A Fifth Circuit en banc opinion and a Louisiana Supreme Court opinion mandated a new trial with respect to the § 1983 and state negligence claims. We also find that, although a new trial was mandated, the district court did not err when it denied the defendant's motion for judgment as a matter

of law. We further hold that the district court did not err in granting summary judgment for the defendants on the § 1983 claim. Finally, having concluded that a new jury trial was necessary and that no federal questions remained, the district court did not err in electing not to exercise pendent jurisdiction.

IV

The first issue we address is whether the district court erred in granting a new trial. Under Fed.R.Civ.P. 59(a), the district court has authority to grant a new trial "to all or any of the parties and on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." We review the district court's decision for abuse of discretion:

> Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial. Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

Del Rio Distributing, Inc. v. Adolph Coors Co., 589 F.2d 176, 179 n.3 (5th Cir. 1979) (quoting 11 Wright & Miller, Federal Practice & Procedure § 2803, at 31-33 (3d ed. 1973)).

To determine whether the district court abused its discretion, we must address whether it was error to grant a new trial with respect to each of Sibley's principal claims – the § 1983 claim and the state negligence claims.

With respect to the state negligence claims, we assess first whether there is any basis for disturbing the jury verdict and, then, if we find such a basis, whether it was more appropriate to grant a new trial or simply grant the defendants' motion for a JML. We thus turn to our analysis of these issues.

A

Sibley asserted a somewhat confusing § 1983 claim at a time when our law on the subject was less than clear. Sibley's claim was that the defendants were responsible for perpetuating a policy that denied mentally disturbed patients reasonable medical care. After a lengthy review of the record, our best formulation of their claim is as follows: There was evidence that the officers in the prison routinely used the isolation cell and shackles to restrain violent prisoners. As a result, the guards did not distinguish between sane and mentally ill prisoners. By failing to do so, the guards hampered their ability to assess whether the condition of a prisoner who was mentally ill was worsening. According to Sibley, this policy – uniform treatment of all violent prisoners – is not reasonably related to a legitimate government goal.

The district court expressed considerable skepticism about whether Sibley's theory amounted to a constitutional violation. However, holding that it was bound by a recent Fifth Circuit opinion, *Scott v. Moore*, 85 F.3d 235 (5th Cir. 1996), the district court concluded that the question of whether a prison policy was reasonably related to a legitimate government objective was a factual question for the jury to decide.

After the district court entered judgment, we issued our en banc opinion in *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997). In that opinion, we made it clear that in a case such as Sibley's, the appropriate analysis was not whether the conditions of confinement were responsible for Sibley's injuries. Rather, his case should be examined as an "episodic act or omission" case:

> In an "episodic act or omission" case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission.

Id. at 53. With respect to an "episodic act or omission" case, we had previously established that the plaintiff must show that an official acted with subjective deliberate indifference. To hold superiors liable, the plaintiff must then show that "the employee's act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the detainee's constitutional rights." *Id.* at 54 (quoting *Hare v. City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996)).

In the light of our en banc decision, the district court therefore correctly concluded that, in this case, it was error to submit the amorphous question of whether the prison's policy was reasonably related to a legitimate government objective to a jury. Instead, the court first had to determine that, based on the record before it, a specific employee had acted with deliberate indifference to Sibley's medical condition. We therefore find no error in

the district's court's conclusion that this error required a new trial on the § 1983 claim.[5]

B

The district court granted a new trial with respect to the state negligence claims because it concluded that, under La.Civ.Code art. 2323, as amended, it had erred when it did not instruct the jury to quantify the fault of the doctors (who were not defendants in the federal case but who were sued, along with the defendants here in the state case). In its earlier ruling on the issue, the court relied on the Louisiana Supreme Court's holding in *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So.2d 975 (La. 1995), to conclude that the jury need not quantify fault to non-parties.

After the decision in *Cavalier* was announced, the Louisiana legislature passed an amendment to art. 2323 in the 1996 Extraordinary Legislative Session of the Legislature requiring a determination of "the degree or percentage of fault of all persons causing or contributing to the injury, death or loss." In *Keith v. United States Fidelity &*

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[5] Because we find that the district court did not err in subsequently granting summary judgment, the issue of whether the district court erred when it denied the defendants' various motions for judgment as a matter of law with respect to the § 1983 claims is mooted. Regardless, given the unique facts of this case, the judge's decision to grant a new trial was reasonable. Our en banc opinion in *Scott* reshaped the court's analysis of the case, and it is understandable why the judge would choose to provide the parties a further opportunity to brief the issues in the light of *Scott* prior to ultimately ruling on them.

Guaranty Co., 694 So.2d 180 (La. 1997), which was issued after the final judgment was entered in this case, the court held that the amendment to art. 2323 is procedural in nature and therefore should be applied retroactively.

In the light of *Keith*, it is apparent that the district court, through no fault of its own, incorrectly refused to permit the quantification of fault among the doctors. On appeal, Sibley argues that actions involving the doctors have already been tried and absolved of fault in state court and that the district court should therefore be collaterally estopped from assigning fault to the doctors in this lawsuit. Sibley is correct that Dr. Amy has been absolved of any wrongdoing in this matter and it would therefore be inappropriate for the jury to assess whether he is at fault. With respect to Dr. Hebert, however, there was no determination that Dr. Hebert was not in part responsible for Sibley's injuries. It was therefore not error on the part of the court to grant a new trial.

The defendants argue that instead of granting its motion for a new trial, the district court should have granted their motion for a JML, because there is no legal cause in fact. Their argument is essentially that, given the extreme nature of the injuries suffered here, there is no way that the result could be legally caused by the guards neglecting a duty. This conclusion is not altogether clear. The relevant duties here are the duty to provide reasonable medical care and the duty [sic] protect the detainee from foreseeable harm.[6] In this case, the defendants

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[6] A corollary to the defendants' argument that the defendants' action did not proximately cause Sibley's injuries is

arguably failed in that duty when they did not make a follow-up call to either Dr. Hebert or Dr. Amy, despite Sibley's apparent worsening condition. If, in those circumstances, they breached either duty, the harm that resulted, although perhaps unexpected and far more damaging than usual, would fall within the kind of harm from which the defendants would have had a duty to protect Sibley.

V

We turn next to the issue of whether the district court erred in granting summary judgment. As we explained in our en banc opinion in *Scott*, in order to make out a § 1983 claim, Sibley must first show that the deputies (Nolan and Trahan) acted with deliberate indifference. It is well settled that "negligent inaction by a jail officer does not violate the due process rights of a person lawfully held in custody of the State." *Hare v. City of Corinth, MS*, 74 F.3d 633, 645 (5th Cir. 1996). Instead, a plaintiff must establish that an official acted with deliberate indifference. In *Hare, id.* at 648, we adopted the same deliberate indifference standard for pretrial detainees as the one

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that the harm was not foreseeable. However, unlike the fact pattern in the now famous case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (N.Y. 1928), where the *type* of harm that occurred was completely unforeseeable, in this case, it was not the type of harm – self-inflicted injuries – which was unforeseeable but rather the *extent* of the harm. It is a well established principle of tort law that, if a defendant has breached a duty of care, the defendant must "take his victim where he finds him." *E.g. Perniciaro v. Brinch*, 384 So.2d 392, 395-96 (La. 1980).

articulated by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), for convicted prisoners:

> It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.
>
> That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails, for the term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.

Id. at 836. Under our deliberate indifference standard, then, it is not enough to demonstrate that Nolan and Trahan were negligent in not calling Dr. Amy when Sibley's condition appeared to worsen. Instead, Sibley must show that Nolan and Trahan were either aware or should have been aware of an unjustifiably high risk that Sibley would hurt himself and failed to act.

Having reviewed the record, we find that, although it is possible that Nolan and Trahan's activity could amount to negligence, there is no evidence that their actions were so reckless as to amount to deliberate indifference. Nolan and the other deputies under Trahan's care monitored Sibley and attempted to care for him when he started kicking the door. Although Sibley's actions seem to have become increasingly erratic, nothing he did so clearly indicated an intent to harm himself that the deputies caring for him could have only concluded that he posed a

serious risk of harm to himself.[7] The record does clearly establish that Sibley's actions in blinding himself are highly unusual and unpredictable, even for someone suffering a psychotic episode. The district court did not err in concluding that none of the prison officials acted with deliberate indifference with respect to Sibley. Having concluded that none of the guards acted with deliberate indifference, their actions are objectively reasonable and the prison officials are entitled to qualified immunity. Sibley's § 1983 claim therefore fails.

VI

We turn finally to whether the district court erred in dismissing the state claims without prejudice. A district court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it had pendent jurisdiction. 28 U.S.C. § 1367(c)(3). We review such decisions for abuse of discretion. *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989). In this case, both federal and state courts had engaged in lengthy proceedings regarding the alleged facts of this case. At the point that the district court granted summary judgment on the § 1983 claims, there remained the need for a full-blown jury trial on the state negligence claims. We find no abuse

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[7] We note here the difference between negligence and deliberate indifference. A reasonably prudent man may well have deemed it necessary to call Dr. Amy in the light of Sibley's worsening condition. To be deliberately indifferent, however, the deputies would have had to have chosen not to call Dr. Amy with the expectation that some harm would result to Sibley.

of discretion in the district court's decision not to conduct that trial in federal court.

VII

This case presents a particularly contorted procedural history. Having carefully reviewed the record, we conclude that the district court correctly recognized that new case law mandated a new trial and acted accordingly. Having reached that decision, the district court provided both sides an opportunity to argue the applicability of the law as set forth in our opinion in *Scott* to the case at hand, before finally ruling that the defendants were entitled to summary judgment on the § 1983 claims, and that the remaining state negligence claims should be dismissed without prejudice. Finding no error on the part of the district court, we

AFFIRM.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION
(Filed March 6, 1997)

JAMES J. SIBLEY, SR.	CIVIL ACTION NO. 90-2573
VERSUS	
SHERIFF RAYWOOD LEMAIRE	JUDGE DOHERTY
	MAG. JUDGE METHVIN

JUDGMENT

This matter came on for trial before a civil jury on September 16, 1996 before the Honorable Rebecca F. Doherty presiding. Present in Court were plaintiffs, James J. Sibley, Sr. and Audrey Sibley through their counsel, James P. Lambert and Gregory K. Klein, and defendants, Raywood Lemaire, Hubert Trahan, and Freddie Nolan, through their counsel, David J. Calogero.

The matter was tried to a civil jury on September 16 through September 25, 1996, with jury deliberations beginning thereafter and concluding on September 26, 1996 when the Court received the following decided upon unanimously by the civil jury:

JURY INTERROGATORIES

42 U.S.C. Section 1983 Claims

1. Do you find Deputy Freddie Nolan violated the constitutional rights of James J. Sibley, Sr. by failing to

provide him reasonable medical care or failing to provide protection against self-harm during his incarceration?

_____ Yes

__X__ No

2. Was the violation of James J. Sibley's constitutional rights by Deputy Freddie Nolan the legal cause of the harm to James J. Sibley, Sr.?

_____ Yes

_____ No

3. Do you find that Chief Deputy Hubert Trahan violated the constitutional rights of James J. Sibley, Sr. by failing to provide him reasonable medical care or failing to provide protection against self-harm during his incarceration?

__X__ Yes

_____ No

4. Was the violation of James J. Sibley, Sr.'s constitutional rights by Chief Deputy Hubert Trahan the legal cause of harm to James J. Sibley, Sr.?

__X__ Yes

_____ No

5. Did Sheriff Raywood Lemaire help develop a governmental custom, policy, ordinance, regulation or

decision that violated James J. Sibley, Sr.'s constitutional rights?

__X__ Yes

_____ No

6. Was Sheriff Raywood Lemaire's governmental custom, policy, ordinance, regulation or decision the legal cause of harm to James J. Sibley, Sr.?

__X__ Yes

_____ No

7. Did Chief Deputy Hubert Trahan help develop a governmental custom, policy, ordinance, regulation or decision that violated James J. Sibley, Sr.'s constitutional rights?

__X__ Yes

_____ No

8. Was Chief Deputy Hubert Trahan's governmental custom, policy, ordinance, regulation or decision the legal cause of harm to James J. Sibley, Sr.?

__X__ Yes

_____ No

9. What proportion or percentage of James J. Sibley, Sr.'s damages do you find from a preponderance of the evidence to have been legally caused by the fault of the respective parties? (Percentages given must equal 100%.)

a. Deputy Freddie Nolan __0__ %

b. Chief Deputy Hubert Trahan __75__ %

c. Sheriff Raywood Lemaire __25__ %

Negligence claims

1. Was the defendant, Deputy Freddie Nolan, negligent in his actions towards James Sibley, Sr.?

__X__ Yes

_____ No

2. Was the negligence of Deputy Freddie Nolan a legal cause of the injuries sustained by James J. Sibley, Sr.?

__X__ Yes

_____ No

3. Was the defendant, chief Deputy Hubert Trahan, negligent in his actions towards James J. Sibley, Sr.?

__X__ Yes

_____ No

4. Was the negligence of Chief Deputy Hubert Trahan a legal cause of the injuries sustained by James J. Sibley, Sr.?

__X__ Yes

_____ No

5. Was the defendant, Sheriff Raywood Lemaire, negligent in his actions toward James J. Sibley, Sr.?

__X__ Yes

_____ No

6. Was the negligence of Sheriff Raywood Lemaire a legal cause of the injuries sustained by James J. Sibley, Sr.?

_____ Yes

__X__ No

7. Were the deputies acting under the control of Sheriff Raywood Lemaire negligent in their actions toward James J. Sibley, Sr.?

__X__ Yes

_____ No

8. Was the negligence of the deputies acting under the control of Sheriff Raywood Lemaire a legal cause of the injuries sustained by James J. Sibley, Sr.?

__X__ Yes

_____ No

9. Was the plaintiff, James J. Sibley, Sr. negligent in his own actions?

__X__ Yes

_____ No

10. Was James J. Sibley, Sr.'s own negligence a legal cause of his damages?

__X__ Yes

_____ No

11. What proportion or percentage of James J. Sibley's damages do you find from a preponderance of the evidence to have been legally caused by the fault of:

a. Deputy Freddie Nolan 10 %

b. Chief Deputy Hubert Trahan 40 %

c. Sheriff Raywood Lemaire for his own actions 0 %

d. Sheriff Raywood Lemaire as master of the deputies under his control 25 %

e. James J. Sibley, Sr. 25 %

12. Do you find that plaintiff's son, James J. Sibley, Jr. has sustained a loss of parental guidance, society, parental love and affection, and/or consortium?

Yes X

No ___

13. Do you find the actions of the defendants were the legal cause of James J. Sibley, Jr.'s loss of parental guidance, society, parental love and affection, and/or consortium?

Yes ___

No X

Damages

1. What amount of damages, if any, did James J. Sibley, Sr. sustain as a result of the alleged incident?

$220,000 Post bodily injury, physical pain and suffering, mental anguish, disability, disfigurement, and embarrassment

$820,000 Future bodily injury, physical pain and suffering, mental anguish, disability, disfigurement and embarrassment

$ 10,000 Future medical and rehabilitation costs

2. Do you find that Chief Deputy Hubert Trahan acted with malice or willfulness or with callous and reckless indifference to the right of James J. Sibley, Sr. to have adequate medical care and to be protected from self harm?

_____ Yes

__X__ No

3. Without regard to any amount you may have awarded in answer to question 1, what amount, if any, do you find should be awarded in punitive damages as a result of the actions of Chief Deputy Hubert Trahan?

$_____

4. Please express in dollars the amount of damages awarded for the loss of parental guidance, society, parental love and affection, and/or consortium.

James Sibley, Jr. $_____

On September 26, 1996, a civil jury reached the above unanimous verdict in this matter. The parties were instructed to submit an agreed to judgment reflecting the jury verdict, however, counsels' submission contained blanks requiring future agreement or determination by the Court, and ultimately the parties were unable to reach any agreement as to the substance of the judgment. Consequently, this court must render a judgment based upon the jury verdict.

At the outset, the Court notes that trial counsel for both parties voiced no objection to the form of the interrogatories as submitted to the jury either prior to the submission to the jury or prior to dismissal of the jury.[1] Subsequent to the jury's verdict, and according to this Court's order, the parties submitted memoranda on the issue of plaintiff's request for prejudgment interest. It became apparent from these memoranda that the parties were not in agreement as to whether pre-judgment interest should be awarded at all, and if awarded, what interest rate should be applied and which rate should apply to what portion of the lump sum award. On October 15, 1996, both parties submitted letters to this Court regarding a proposed judgment. The plaintiff's letter purported to reflect an agreement of the parties on the form of the judgment, but noted the parties were still in disagreement on the issue of legal interest. The plaintiff's letter indicated that the parties agreed the judgment should be awarded as follows:

> [A]n award on which all three men [Sheriff Raywood Lemaire, Chief Deputy Hubert Trahan, and Deputy Freddie Nolan] would be liable ($787,500.00), and an award upon which only Sheriff Lemaire and Chief Deputy Trahan would be liable ($262,500.00 – the amount

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[1] Further, when the Court addressed the issue of providing interrogatories for damages which reflected a separate finding between § 1983 and state law negligence, the parties agreed that if any finding were made under § 1983, all damages would be considered to be found under § 1983, in part reflecting plaintiff's pursuit of punitive damages and attorney's fees. However, thereafter both parties shifted their position on this issue, but assured the Court they could agree as to a delineation.

> remaining over and above the negligence award *to constitute the full* sum of $1,050,000.00).

Defendants' letter to this Court, also submitted on October 15, 1996, stated that plaintiff's letter constituted "a proposed judgment reflecting our agreement concerning the form of any judgment to be entered. However, the *substance* of that judgment is still in dispute." (emphasis added) Also, it seemed, the defendants were not at that time challenging the amounts to be awarded under the § 1983 liability and negligence liability or as against each defendant in each context, but were instead challenging the award of a judgment at all via a Motion to Strike Jury. The Motion to Strike the Jury – filed *after* the full jury trial – was denied for the reasons given at that time and made a part of the record.

Nonetheless, this Court still had before it the issue of pre-judgment interest. However, it was apparent that before the Court could decide the issue of pre-judgment interest, problems presented by the jury verdict had to be resolved. First, the jury, as instructed, awarded damages in one lump sum amount only: presumably to cover plaintiff's recovery both on his 42 U.S.C. § 1983 civil rights claim and his state law negligence claim. The jury found certain defendants liable for their actions under § 1983 and certain other and some common defendants liable for their actions under state law negligence. The jury found the plaintiff to have been twenty-five (25%) percent at fault in causing his damages under his state law negligence claim – comparative fault is not allowed under § 1983. The jury did not find Deputy Freddie Nolan liable to the plaintiff under 42 U.S.C. § 1983, but the jury did find Deputy Freddie Nolan liable to the plaintiff

under negligence. As noted, the jury found, under its negligence findings, that plaintiff was twenty-five (25%) percent at fault; no comparative fault of the plaintiff was included in the § 1983 finding.

In order to decide to which amounts federal pre-judgment interest should apply and to which amounts state pre-judgment interest should apply, this Court must decide first *what amounts were awarded under each claim.* The jury was not asked to make that delineation. Plaintiff was found twenty-five (25%) percent at fault under state negligence law and not under § 1983. Prejudgment interest shall be awarded, except for periods of undue delay, for awards made pursuant to state negligence law. This dilemma was enhanced as the parties seemingly had agreed the award was now not to fall completely under either the § 1983 finding or the negligence finding.[2]

Further, under the jury verdict, it is not clear for what amount Deputy Freddie Nolan should be responsible as he was found at fault only under the negligence claim; plaintiff also was found liable for twenty-five (25%) percent of those damages, and the jury did not designate the

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[2] Prior to commencement of trial both attorneys had, at that time, agreed that should the jury award any damages under § 1983, all damages would therefore rest under that claim. Upon reflection, however, the parties changed their relative positions on this issue. Also, thereafter, notwithstanding recent assertions to the contrary, both parties had agreed that comparative fault would apply only to the negligence claims and not to the total lump sum award or in other words, not to any award under § 1983; the parties have altered their relative positions on this issue as is evidenced by defendant's most recent motion and plaintiff's letter response.

dollar amount to be awarded under negligence and the dollar amount recoverable under § 1983 thus totaling his entire damages; rather, awarded a lump sum only.[3]

In an attempt to resolve these problems and to determine how to award pre-judgment interest and to what amount of the $1,050,000.00 award, this Court scheduled a telephone conference on October 22, 1996. During the October 22, 1996 conference, the Court noted plaintiff's October 15, 1996 letter concerning a proposed judgment, and defendant's agreement with said letter, and attempted to clarify the practical effects of the alleged agreements. In that conference, the parties agreed upon the following matters, as reflected in the Minute Entry for that day:

> The parties agree and stipulate that $787,500.00, as reflected in plaintiff's letter to this Court of October 15, 1996, represents the jury award for plaintiff's state law negligence claim. Defendant agrees and both parties stipulate that this amount need not be further reduced by the jury's finding of contributory negligence as to plaintiff as contributory negligence has already been figured into this amount. Both parties further agree and stipulate that all three defendants are solidarily liable for this amount.
>
> Both parties agree and stipulate as reflected in plaintiff's letter of October 15, 1996, that $262,500.00 is the jury award and plaintiff's

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[3] Plaintiff argues Deputy Nolan is liable in solido with the other defendants and argues this satisfies the issue; this Court is not at all convinced the issue is disposed of so easily.

> recovery on his § 1983 claims against Defendants Trahan and Lemaire.
>
> Both parties agree and stipulate that Louisiana law as to pre-judgment interest applies to plaintiff's recovery of $787,500.00 on his state law negligence claim. The parties further agree and stipulate that federal law as to prejudgment interest applies to plaintiff's recovery of $262,500.00 upon his § 1983 claims.

However, as reflected in this Court's Minute Entry of October 23, 1996, defense counsel contacted this Court on October 23, 1996 and expressed his disagreement with this Court's memorialization of the conference reflected in the Minute Entry of October 22, 1996. Therefore, this Court ordered the parties to inform the Court, in writing, as to what they could agree and to what they could not agree as to the judgment and the issues surrounding the judgment. On October 24, 1996, the parties submitted a formal letter reflecting their areas of agreement and disagreement concerning the proposed judgment and the issues of pre-judgment interest. In this letter, the parties stated they agreed that:

> (a) The form of the judgment submitted is appropriate if the Court awards pre-judgment interest. If the Court does not award any pre-judgment interest, then a modification of the form of the judgment by the Court would be appropriate.
>
> (b) The jury assessed damages in the amount of $1,050,000.00 without apportionment of the damages between the Section 1983 claims and the state negligence claims.

(c) The form of the judgment contains a breakdown of money damages for the purpose of apportionment of solidary liability between the defendants.

(d) Any award under state law must be reduced by 25% for plaintiff's comparative fault. The figure in the judgment of $787,500.00 reflects the jury's application of comparative fault and need not be further reduced by the Court.

(e) Section 1961 controls the award of post-judgment interest.

The parties then stated they did not agree as to the following areas:

(a) That the money award of principal should be apportioned between the Section 1983 claims and the state law negligence claims.

(b) That Louisiana law applies to any part of the money judgment for the purpose of calculation of pre-judgment interest.

Defendant contends that federal law should govern the award of pre-judgment interest on the entire judgment in light of plaintiff's choice of forum. Plaintiff contends that he is entitled to pre-judgment interest under state law as to that portion of the jury's damage award which is attributable to his state law claims. As to the portion over and above the state law claim, plaintiff contends that federal law applies, but that federal law would warrant a choice of state law interest, all as set forth in his memorandum filed previously.

In light of the substantial disagreement between the parties reflected in the letter, this Court scheduled oral

argument and hearing upon the judgment on December 19, 1996.

> This Court hereby schedules oral hearing upon the Judgment in this matter for December 19, 1996, at 10:00 a.m. This Court will hear argument upon the proposed apportionment of damages in this matter in light of the jury's finding all defendants and the plaintiff negligent, and the jury's partial finding of liability on the civil rights claims. This court will hear argument on the form of the Judgment, if a judgment can be entered in this matter in light of the facts that; (1) the jury did not apportion the damage award between the negligence and civil rights claims, (2) the jury did not find Deputy Nolan liable for a civil rights violation, and (3) the jury found the plaintiff to have been contributorily negligent. The issue of pre-judgment interest is necessarily dependent upon resolution of these matters.

Minute Entry of November 27, 1996.

At hearing, in open court on December 19, 1996, the parties stated, as reflected in the record of that hearing, that they agreed upon the following;

> (1) plaintiff would recover $262,500.00 on his § 1983 claim against Defendants Sheriff Lemaire and Chief Deputy Trahan,
>
> (2) plaintiff would recover $787,500.00 against all three defendants under both his state negligence and federal civil rights claims.

In colloquy with counsel during the hearing, this Court stated:

> Have the two of you agreed to a judgment and how the money will be apportioned in that? I will tell you, quite frankly, if you didn't pick it up from my minute entry, as I told you early on, I'm not certain it can be done. It was one thing if you both agreed that if any finding was found under 1983, it would all fall there. That was fine. That took care of the problem. But when you start wanting to go between the two, I don't know how it can be done. If both parties agreed on how you wish to do it and then how the prejudgment interest will play and how the contributory negligence will play, that's fine. If not, I'm likely to leave you today getting me a brief on why I should not find for a new trial under Federal Rules of Civil Procedure 59(d) and on the basis we can't do a judgment.

Transcript of December 19, 1996 Hearing at 19. The Court then summarized what the parties stated during the hearing was their position regarding the judgment.

> The Court: But both of you agree that this Court should look at the amounts awarded in the following manner. Two hundred sixty-two thousand five hundred dollars as having been awarded solely under 1983, and the seven hundred eight [sic]-seven thousand five hundred dollars to have been awarded under both state negligence and 1983.
>
> Mr. Lambert: That's correct, Your Honor.
>
> Mr. Calogero: Yes.
>
> The Court: Under 1983, prejudgment interest is discretionary; am I correct?
>
> Mr. Lambert: That's correct, Your Honor.

> The Court: Under the state, it is not discretionary; but there is a question as to what the amount would be?
>
> Mr. Lambert: I think that's right.
>
> The Court: Based upon the statute Mr. Calogero has argued. Am I correct then that those are the only two issues in the apportionment of damages vis-a-vis these awards that the two of you do not agree upon?
>
> Mr. Lambert: That's right.
>
> Mr. Calogero: (Nods head affirmatively.)
>
> Mr. Lambert: That is correct.
>
> The Court: It is on the record, and it is going to stay on the record with the court reporter. No changing the minds. Both parties agree that the only problem we've got here is whether I award prejudgment interest on the two hundred and sixty-two thousand five hundred pursuant to 1983 and in effect what percentage rate I would use on the seven hundred and eight [sic]-seven thousand five hundred because it is awarded both under state and federal. . . .

Pursuant to this agreement between the parties upon the apportionment of damages in this matter, this Court then proceeded to fashion a judgment, and reached a decision upon pre-judgment legal interest and attorney's fees as well. However, and not to this Court's surprise, on January 16, 1997, the defendants submitted a memorandum concerning the judgment. Therein, the defendants contended that "the § 1983 award should account for Plaintiff's comparative fault, resulting in a reduction of money damages in the amount of twenty-five (25%) percent."

Defendant *now* contends that plaintiff's entire recovery should be reduced by twenty-five (25%) percent to reflect the jury's finding that plaintiff was twenty-five (25%) percent at fault under the negligence claim. This contention is in direct opposition to defendants' agreement before trial, recognized by the defendants in the December 19, 1996 hearing, that a finding of comparative fault on the part of the plaintiff would not reduce the plaintiff's recovery under § 1983. See Transcript of December 19, 1996 Hearing at p. 3. Nonetheless, the defendant now contends, in direct opposition to his statement in open court on December 19, 1996, that plaintiff should be awarded "seventy-five (75%) percent of the money damages assessed by the jury, Seven Hundred Eighty-Seven Thousand Five Hundred and no/100 ($787,500.00) Dollars."

In light of the parties' manifest inability to agree upon an apportionment of the damages awarded between the § 1983 and state negligence claims, this Court finds that notwithstanding prior assertions to the contrary, it cannot look to the parties for an agreement which might cure the ambiguity that has plagued this finding.

Therefore, this Court must fashion a just judgment in this matter reflecting the findings of the jury in light of the jury's failure to apportion damages between the negligence claim and civil rights claim, the jury's finding that Deputy Freddie Nolan was liable under plaintiff's negligence claim but not liable under plaintiff's § 1983 civil rights claim, and the jury's finding that plaintiff was twenty-five (25%) percent at fault under his negligence claim, and necessity of awarding pre-judgment interest to

a portion of the amount awarded under the state negligence claim but not to the amount awarded under the § 1983 claim.

It is difficult to render judgment in this matter given the contradictory findings on fault relative to the two different claims and the one lump sum award of damages. Specifically, this Court is uncertain as to the amount of Deputy Freddie Nolan's liability and the amount to assess to plaintiff's twenty-five (25%) percent comparative fault, and upon what amount to award pre-judgment interest.[5]

This Court finds itself within a foggy region of jurisprudence and rules where Fed. R. Civ. Pro. 49 seems to provide the clearest guidance. In particular, Fed. R. Civ. Pro. 49(a).[6] Rule 49(a) provides:

> **(a) Special verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which

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[5] This issue was not lost on the Court prior to trial, and was noted to counsel, however, it was believed by counsel then that agreements on the matter would solve the dilemma. It has not.

[6] This Court finds Fed. R. Civ. Pro. 49(a) applicable as the verdict was in the form of a special verdict. *See, Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 692-94 (5th Cir. 1966) *cert. denied*, 385 U.S. 1004, 87 S.Ct. 708, 17 L.Ed.2d 543, *cert. denied, Strachan Shipping Co. v. Royal Netherlands Steamship Co.*, 385 U.S. 1004, 87 S.Ct. 710, 17 L.Ed.2d 543 (1967) (setting forth a special verdict complete with detailed questions of historical fact submitted under Rule 49(a)).

> might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

This Court finds Fed. R. Civ. Pro. 49(a) the most applicable, however, as noted, this Court recognizes that its framing of this issue as one falling under Rule 49(a) is subject to interpretation. The distinction between the two different forms of verdict reflected in Rules 49(a) and 49(b) is elusive and not clarified by the jurisprudence. Circuit case law clarifying the distinction made by the rules between general verdicts and special verdicts is limited and seemingly contradictory. In *Willard v. The John Hayward*, 577 F.2d 1009, 1010-11 (5th Cir. 1978), the Fifth Circuit, while not deciding the issue, considered a verdict similar to the one before this court as falling under Rule 49(a). However, the court went on to note that if a verdict is irreconcilably inconsistent – or, assumedly, inadequate – *a new trial must be granted.*

Further, in another Fifth Circuit case addressing Rule 49(a), the court stated:

> It is critical, however, that the structure of the questions and proposed answers avoid the possibility that the answers will be conflicting. That danger is mitigated by the court's duty, arising from the seventh amendment guarantee of the right to jury trial, to reconcile apparently conflicting answers if at all possible and thus validate the jury verdict. *Gallick v. Baltimore & Ohio Railroad Co.*, 1963, 372 U.S. 108, 119 83 S.Ct. 659 666, 9 L.Ed.2d 618, 627; *Atlantic & Gulf Stevedores, Inc. vs. Ellerman Lines, Ltd.*, 1962, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 806. We have applied this rule countless times, E.g., *Willard v. The John Hayward*, 5 Cir. 1978, 577 F.2d 1009; *Loffland Brothers Co. v. Roberts*, 5 Cir. 1967, 386 F.2d 540, *Cert. denied*, 1968 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830. Where, however, the answers cannot be reconciled "after a concerted effort" *Miller v. Royal Netherlands Steamship Co.*, 5 Cir. 1975, 508 F.2d 1103F 1106, a new trial must be granted. E.g., *Griffin v. Matherne*, 5 Cir. 1973, 471 F.2d 911; *Hand v. United States*, 5 Cir. 1971, 441 F.2d 529; *Royal Netherlands Steamslaip Co. v. Strachan Shipping Co.*, 5 Cir. 1966, 362 F.2d 691, *Cert. denied*, 1967, 385 U.S. 1004, 87 S.Ct. 708 and 710, 17 L.Ed.2d 543.

Guidry v. KEM Mnfg Co., 598 F.2d 402, 406 (5th Cir.) *reh'g denied*, 604 F.2d 320 (1979), *cert. denied*, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980).

The Ninth Circuit in *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991), after noting that "[n]either Rule 49(a) nor 49(b) prescribes precise direction for formulat[ion]," and that "special verdicts often resemble general verdicts with

interrogatories," stated that "the interrogatories submitted to the jury in this case constituted a special verdict, simply because that is what the trial court declared them to be." *Id.* at 1395-96. The Eighth Circuit in *Rheuport v. Ferguson*, 819 F.2d 1459 (8th Cir. 1987), weighed in on the issue and concluded that *a new trial* was required as to damages in a matter where the jury failed to apportion damages between multiple defendants in a factually similar case to the one at issue today. *Id.*, at 1464. However, the *Rheuport* court did not discuss Rules 49(a) and 49(b), or general and special verdicts.

In the Fifth Circuit case of *Lewis v. Parish of Terrebonne*, 894 F.2d 142 (5th Cir.) *reh'g denied*, 901 F.2d 1110 (1990). The district court submitted the case to the jury by preparing specific questions to resolve factual disputes. Plaintiff, after verdict was rendered, argued there was an unsubmitted factual question and a verdict form so inconsistent in its inquires [sic] as to equal "wholesale confusion and misdirection." The court determined the problem was an omitted issue, i.e., "the damages, if any, suffered by the decedent as a result of his self-inflicted hanging." The Court determined that as to factual issues omitted without objection, the party had waived his right to a jury determination and the court should make that factual determination.

Consequently, the jurisprudence requires that this Court fashion a judgment in accord with the jury's findings *if at all possible*. Only if it is impossible to fashion a just judgment can this Court grant a new trial. This Court has had doubts as to whether it can render judgment based upon the jury's verdict. However, taking into consideration all of the voluminous testimony and evidence

placed before the jury, the Court has fashioned a judgment it feels represents the essential essence of the jury's findings.

There has been little guidance provided in the jurisprudence for the Court's attempt to reconcile the jury's findings. However, The Tenth Circuit in *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979), provided some useful direction:

> In the instant case, should the jury determine that Flynn's liability is to be grounded in negligence only, the total damages assessed shall be reduced, of course, by that percentage of negligence attributed to Clappier. If, however, the jury should find that Flynn is liable to Clappier for damages in violation of Clappier's Eighth Amendment rights under 42 U.S.C. Sec. 1983 only, then the total amount of damages assessed should be awarded.
>
> Similarly, if Flynn is found to have been both negligent and to have violated 42 U.S.C. Sec. 1983, the Sec. 1983 action should prevail and Clappier should be awarded the total amount of damages found thereunder. We believe that such is required inasmuch as a higher standard of culpability exists in a Sec. 1983 action charging cruel and unusual punishment than in an action based upon negligence and circumstances similar to that which occurred herein. This assumes, as we must, that the damages award will necessarily be equal or greater on the determination of liability under the Sec. 1983 claim.
>
> Of course, should Flynn be found to be free of negligence and not to have violated Clappier's civil rights, a defense verdict must be entered.

> In summary, we conclude that, inasmuch as both the federal claim for relief and the state claim for relief in the case at bar arose from the same, identical, operative facts, both of which sought identical relief, i.e., compensatory damages (with some exceptions not relevant in view of our disposition) that it was error to award judgment under more than one theory of liability on the claims as pled. To do so constitutes "double recovery".

Id. at 530-31. Again, this Court must reconcile the findings if *at all possible*.

Defendants contend that all sums should be awarded under the 1983 civil rights violation, and that this amount should be reduced by twenty-five (25%) percent to reflect the jury's finding of comparative negligence on the part of the plaintiff. Defendants rely upon *Dobson v. Camden*, 705 F.2d 759 (5th Cir.), *reh'g en banc granted*, 709 F.2d 7 (1983), *vacated and rev'd*, 725 F.2d 1003 (1984), to support their position. However, defendants have neglected to inform this Court in their briefing that rehearing en banc was granted in *Dobson*, or that once such rehearing was granted, the Fifth Circuit decided the matter differently, and on grounds that do not support the defendants' position. This Court notes that the vacated *Dobson* opinion, even if not vacated, would only have been of value to this Court in directing it to apply 42 U.S.C. § 1988 to this matter.

This Court finds that the "deliberate indifference" standard required to find liability for failure to provide adequate medical care and protection from self-harm is a

higher standard than negligence. This makes such violation more in the nature of an intentional tort. Following the direction of 42 U.S.C. § 1988, and finding no direction within § 1983 as to this issue, this Court looks to Louisiana law. *See Delesma v. City of Dallas*, 770 F.2d 1334, 1336-37 (5th Cir. 1985). In *Hattori v. Peairs*, 662 So.2d 509 (La. App. 1st Cir. 1995), *writ denied*, 666 So.2d 322 (La. 1996), a foreign exchange student was shot by a Louisiana homeowner when the exchange student, dressed in costume, mistook the house for another and failed to stop when the homeowner yelled "Freeze!" The court noted that comparative negligence had been applied to reduce plaintiff recovery in some Louisiana assault and battery cases, and then declined to apply comparative negligence in the case before it, finding the victim had not invited the assault. This Court finds the jury in this matter has necessarily determined the defendants' actions were "deliberately indifferent" and led to the plaintiff's damages. The plaintiff did not invite their deliberate indifference, and this Court finds that it was only after such deliberate indifference that plaintiff took actions the jury evidently found negligent. This Court, taking into consideration all of the evidence and with due regard for the jury's findings, declines to apply comparative negligence to reduce plaintiff's recovery under § 1983.

The Court, after receiving the verdict and ruling upon various motions as contained in the Minutes of the Court, and having received briefs by both counsel on the issue, this Court finds the verdict to be in proper form and order, enters judgment as follows:

IT IS ORDERED there be judgment herein in favor of plaintiff, James J. Sibley, Sr., and against the defendants,

Sheriff Raywood Lemaire and Hubert J. Trahan, *in solido*, in the sum of ONE MILLION FIFTY THOUSAND ($1,050,000.00) AND NO/100 DOLLARS, plus post-judgment legal interest pursuant to 28 U.S.C. § 1961, which rate is set at 5.61 per cent per annum, said postjudgment interest to run from date of entry of judgment until paid. Freddie Nolan shall be secondarily liable, *in solido*, for a reduced portion of that sum to reflect the jury's finding against him only for negligence and the jury's finding that the plaintiff was comparatively negligent, namely in the sum of SEVEN HUNDRED EIGHTY-SEVEN THOUSAND AND FIVE HUNDRED ($787,500.00) DOLLARS. This Court declines to award pre-judgment interest under 42 U.S.C. § 1983. The decision whether or not to award pre-judgment interest "is in the hands of the district court," as a necessary element of its "authority to fashion relief." *Hale v. Fish*, 899 F.2d 390, 404 (5th Cir. 1990). This Court finds that a large portion of the jury's award reflected intangible losses. In addition, much of the time elapsed since the filing of plaintiff's complaint has been due to plaintiff's delay.[7]

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[7] It would be manifestly inequitable to award plaintiff pre-judgment interest for the period from September 9, 1992 to January 29, 1996, during which time plaintiff did nothing to advance his complaint in this Court. On September 9, 1992, a Medical Review Panel rendered a decision in this matter. Plaintiff had been granted a continuance in anticipation of this state entity's decision and its possible impact upon the litigation in this Court. This Court on October 8, 1992, granted plaintiff until November 13, 1992 to notify this Court of the status of this matter in light of the state entry's decision. The next document filed with this Court was a letter from James Lambert indicating that he was now counsel for plaintiff, dated January 26, 1995.

Having reviewed the plaintiff's initial and supplemental applications for attorney's fees for reasonableness in light of the requirements of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as well as the impact of the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), the Court determines that the lodestar is as follows: the reasonable hourly rate is $150.00, the reasonable hours expended in the initial application are 390.3, and the hours expended in the supplemental application are 21.9. The hours expended in the initial application are reduced by 2.4 hours of Joseph Joy's time billed for conferences with his paralegal, which amounts are not recoverable; 69 hours for Gregory Klein's trial attendance, as the Fifth Circuit has repeatedly advised that billing time of more than one attorney for a court proceeding, where one or more attorneys are present only as observers, constitutes duplicative billing – *Johnson*, 488 F.2d at 717; *Flowers v. Wiley*, 675 F.2d 704, 705 (5th Cir. 1982); *Abrams v. Baylor College*, 805 F.2d 528, 535 (5th Cir. 1986); 31.6 hours of the paralegal's time for summarizing depositions, as the time spent summarizing some of the depositions exceeded the amount of time for taking those depositions; and 86.5 hours for the paralegal's trial attendance, as this constituted duplicative billing. The hours claimed in the supplemental statement for attorneys' fees

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The first substantive document filed with this Court after the September 9, 1992 Medical Review Panel decision was plaintiff's Motion for Leave to File First Amending Complaint, filed on January 29, 1996.

and costs are reduced by one-third (33 1/3%) for plaintiff's inadequate documentation on the expenses for computer-generated research, excessive entries for research, and lack of evidence of billing judgment. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939, 76 L.Ed.2d at 51; *Von Clark v. Butler*, 916 F.2d 255, 259 (5th Cir. 1990); *Walker v. U.S. Dept of Housing and Urban Development*, 99 F.3d 761, 770 (5th Cir. 1996) *opinion amended*, ___ F.3d ___, 1996 WL 731538; *Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir.) *reh'g denied*, 836 F.2d 1346 (1987), *cert. denied*, 486 U.S. 1008, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988). The Court rejects plaintiff's request for an adjustment of the hourly rate to $250.00, as the amount awarded is adequate to compensate the attorneys and counsel have agreed that $150.00 is the prevailing rate in the community.

An analysis of the Johnson factors does not support an adjustment of the lodestar. The factors and analysis follow: (1) *Time and labor involved*: the lodestar adequately compensates time and labor involved. (2) *Novelty and difficulty of the questions*: although the facts of this case were sensational, the legal issues in the case are not unusually novel or complex. (3) *The skill required to perform the legal services properly*: the hourly rate adequately compensates counsel for the level of skill required to handle this case competently. (4) *Preclusion of other employment*: no evidence was offered to establish that this case precluded handling of other cases. (5) *Customary fee*: the affidavit of counsel indicates that the hourly rate of $150.00 in civil rights cases in this area is customary; thus, defense counsel's fee is in accordance with the prevailing community rate. (6) *Fixed or contingent fee*: this factor does not require the alteration of the lodestar

despite the fact that petitioner's counsel did have a contingency fee contract. The fee award represents the reasonable worth of the services rendered for plaintiff's claim, and the contingency fee contract does not require an adjustment of this amount. *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). (7) *Time limitations*: no evidence was adduced on this point. (8) *The time involved and the results obtained*: this litigation was delayed due to the inaction of the plaintiff;[8] thus, the lodestar adequately compensates for this factor. (9) *The experience, reputation and ability of counsel*: counsel enjoys the reputation of providing competent representation; the lodestar, however, adequately compensates for this factor. (10) *The undesirability of the case*: this case was highly publicized and provided a great deal of media exposure to plaintiff's counsel; thus, this does not dictate adjustment. (11) *The nature and length of the professional relationship with the client*: no evidence was adduced on this point. (12) *Awards in similar cases*: Counsel has not cited any in the motion for attorney's fees.

The Court has also considered the limited objections of defense counsel to plaintiff's application, and finds them to be without merit. The Prison Litigation Reform Act of 1996 is inapplicable to this case. *Weaver v. Clarke*, 993 F.Supp. 831, 835 (D. Neb. 1996). Further, the plaintiff's state and federal claims for relief are so interrelated, and the time spent in preparation of those claims so overlapping, that an attempt to separate the time attributable to one or the other would be futile. *Hensley*, 461 U.S.

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[8] *See* note 8, *supra*.

at 434-35, 103 S.Ct. at 1940; *Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4, 7 (1st Cir. 1993).

Accordingly, IT IS ORDERED there be judgment herein in favor of plaintiff, James J. Sibley, Sr., and against the defendants, Sheriff Raywood Lemaire and Hubert J. Trahan, *in solido*, in the sum of ONE MILLION FIFTY THOUSAND ($1,050,000.00) AND NO/100 DOLLARS, plus post-judgment legal interest pursuant to 28 U.S.C. § 1961, which rate is set at 5.61 per cent per annum, said post-judgment interest to run from date of entry of judgment until paid. Freddie Nolan shall be secondarily liable, *in solido*, for a reduced portion of that sum to reflect the jury's finding against him only for negligence and the jury's finding that the plaintiff was comparatively negligent, namely in the sum of SEVEN HUNDRED EIGHTY-SEVEN THOUSAND AND FIVE HUNDRED ($787,500.00) DOLLARS.

IT IS ORDERED that James J. Sibley, Sr. is awarded attorney's fees and expenses in the amount of $58,666.48 on the initial application and $4,198.60 on the supplemental application, for a total of $62,865.08.

IT IS ORDERED that there be judgment herein in favor of Freddie Nolan and against plaintiff, James J. Sibley, Sr., dismissing the demands of plaintiff under 42 U.S.C. § 1983 with prejudice thereto;

IT IS ORDERED that there be judgment herein in favor of defendants, Sheriff Raywood Lemaire, Hubert J. Trahan and Freddie Nolan, dismissing the demands made on behalf of James J. Sibley, Jr. [sic] with full prejudice thereto.

Lafayette, Louisiana, this 6 day of March, 1997.

/s/ Rebecca E. Doherty
REBECCA E. DOHERTY
UNITED STATED [sic]
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

JAMES J. SIBLEY, SR.
VERSUS
SHERIFF RAYWOOD LEMAIRE, ET AL

CIVIL ACTION NUMBER: 90-2573
JUDGE DOHERTY
MAGISTRATE JUDGE METHVIN

MEMORANDUM RULING

(Filed Jun. 19, 1997)

Before this Court are defendants, Sheriff Raywood J. Lemaire, Chief Deputy Hubert Trahan, and Jailer Supervisor Freddie Nolan, re-urging certain issues and raising others under motions for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50 and motions for new trial pursuant to Rule 59. Defendants Lemaire and Trahan contend they are entitled to judgment as a matter of law on plaintiff's, James J. Sibley, Sr.'s, official capacity civil rights claims. All three defendants, Lemaire, Trahan, and Nolan, contend they are entitled to judgment as a matter of law on plaintiff's negligence claim. Finally, Defendant Trahan contends he is entitled to judgment as a matter of law on the basis of qualified immunity upon plaintiff's individual capacity civil rights claim against Trahan. Defendants ask this Court, in the alternative, to grant a new trial on these claims pursuant to Fed. R. Civ. Pro. 59.

Defendants also contend that various injustices occurring during the course of the trial entitle them to a new trial pursuant to Fed. R. Civ. Pro. 59. Defendants

contend the jury's verdict was excessive, and therefore they are entitled to either a new trial or a remittitur. Defendants contend this Court's award of attorney's fees to the plaintiff is excessive and should be reduced.

Defendant Trahan also brings a Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6), contending that if this Court grants Defendant Lemaire's Motion for Judgment as a Matter of Law on plaintiff's official capacity civil rights § 1983 claim against Lemaire, then plaintiff's claims against Defendant Trahan under § 1983 are prescribed.

Finally, defendants request this Court for leave to amend their Motion for New Trial in order to argue that they are entitled to a new trial because this Court erroneously refused to place nonparties on the jury verdict form.

No pretrial motions urging qualified immunity were filed; this matter was tried to a civil jury on September 16 – 25, 1996, with jury deliberations beginning thereafter and concluding on September 26, 1996. The jury returned a unanimous verdict for the plaintiff against all defendants on all of plaintiff's claims with the exception of plaintiff's claim against Defendant Nolan for a violation of plaintiff's civil rights. The jury's full findings, and an extensive recounting of the procedural history of this case are set forth in this Court's Judgment of March 6, 1997.

Facts

The basic facts of this matter are as follows. Plaintiff, James J. Sibley, Sr., was arrested and taken into custody

by Deputy Lorne Abshire of the Vermilion Parish Sheriff's Department for simple battery and aggravated assault on the evening of November 22, 1989. Deputy Abshire was advised by plaintiff's family members, who filed the charges against plaintiff, that plaintiff suffered from mental illness and Deputy Abshire was also advised of their desire that the Sheriff's Department provide "some help" to the plaintiff. The plaintiff was taken to the Vermilion Parish Correctional Center ("VPCC"). The Sheriff of Vermilion Parish was Raywood Lemaire; Chief Deputy Hubert Trahan was in charge of operating the VPCC; Deputy Freddie Nolan operated as a Jailer Supervisor at the VPCC.

Plaintiff remained in the VPCC from November 22 to November 27, 1989. He was at first placed in a holding cell, but was later moved to an isolation cell because of his behavior. Once in the holding cell, and after making noise by banging against his cell door, plaintiff was shackled to his bed by his leg with an eighteen inch chain. The parties dispute the length of time plaintiff remained shackled. During this period plaintiff was seen by two medical doctors and a nurse; there was a factual dispute as to whether plaintiff's behavior escalated and became more bizarre during this time and after he was last seen by a doctor. There was a factual dispute as to how often the jailors checked on plaintiff during this time. On November 27, 1989, plaintiff self-mutilated his eyes and is now blind in both eyes.

On September 26, 1996, the jury returned a unanimous verdict for the plaintiff. The jury found Lemaire and Trahan liable to plaintiff for violation of his civil rights in their official capacity as policy makers for the

VPCC. The jury also found Trahan liable in his individual capacity to plaintiff for violation of plaintiff's civil rights. The jury did not find Nolan liable in his individual capacity for violation of plaintiff's rights. The jury found all three defendants liable to the plaintiff under state law negligence claims. La. Civ. Code art. 2315. On November 27, 1996, after full trial on the matter, upon initial filing this Court denied Trahan's Motion for Summary Judgment on the basis of qualified immunity. After extensive briefing, on March 6, 1997, this Court issued a Judgment in accordance with the jury's verdict. Analysis The standard this Court must follow in deciding a motion for judgment as a matter of law is set forth in Fed. R. Civ. Pro. 50. This Court may only grant judgment as a matter of law against a party if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. Pro. 50(a)(1). The Fifth Circuit in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969), set forth a familiar standard for motions for judgment as a matter of law in federal court:

> [T]he Court should consider all of the evidence – not just that evidence which supports the nonmovers case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand,if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of

> impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as a traditional finder of facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75. *See Charles E. Beard, Inc. v. McDonnell Douglas Corp.*, 939 F.2d 280, 282 (5th Cir. 1991).

Rule 59 governs the granting of a new trial in federal court. Rule 59 provides, in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

Fed. R. Civ. Pro. 59(a).

The standard for granting a new trial pursuant to Rule 59 is lower than the standard for granting judgment as a matter of law, yet it still requires a substantial nonconformance between the weight of the evidence and the jury's verdict.

> [W]e require that a new trial should not be granted on evidentiary grounds "unless, at a

> minimum, the verdict is against the great – not merely the greater – weight of the evidence." [*Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 363 (5th Cir. 1980) (*per curiam*) (citing *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976)]. This standard, of course, is lower than that for a directed verdict or a judgment notwithstanding the verdict. . . . A verdict can be against the "great weight of the evidence", and thus justify a new trial, even if there is substantial evidence to support it. . . . The trial court in passing on a motion for a new trial need not take the view of the evidence most favorable to the verdict winner, but may weigh the evidence. . . . This does not mean that a judge may order a new trial simply because he disagrees with a jury verdict. He must be convinced that the verdict is against the great weight of the evidence.

Shows v. Jamison Bedding, Inc., 671 F.2d 927, 930 (5th Cir. 1982) (some citations omitted).

Defendants Lemaire's, Trahan's, and Nolan's, original motions for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50, are hereby DENIED for reasons given at the first urging of these motions. Defendants' Motion for New Trial on Damages, or, in the Alternative, Remittitur, is also DENIED. As Defendant Trahan argued his Motion to Dismiss on the basis of prescription should only be granted in the event that this Court grants Sheriff Lemaire's Motion for Judgment as a Matter of Law on plaintiff's official capacity claims against Lemaire, Defendant Trahan's Motion to Dismiss is DENIED.

Defendants submitted leave to file an amended Motion for New Trial and an amended motion for new

trial on June 9, 1997; this Court had entered judgment in this matter on March 6, 1997. Defendants' first Motion for New Trial was filed on March 18, 1997, along with Defendants' motions for judgment as a matter of law. Defendants now seek to amend their Motion for New Trial on the ground that on May 9, 1997, the Louisiana Supreme Court issued the ruling in *Keith v. U.S. Fidelity & Guarantee Co.*, 1997 WL 242555 (La. May 9, 1997), holding Louisiana's 1996 fault revisions to be retroactive and arguing that therefore, this Court erred in not placing Drs. Ardly Hebert and Brian Amy on the jury verdict form over defendants' contemporaneous objection. Defendants argue there was compelling evidence submitted to the jury concerning the duties and responsibilities of the Parish Coroner, Dr. Hebert, and his Assistant Coroner, Dr. Amy, to detainees held in the VPCC. Defendants further argue that strong and compelling evidence of malfeasance on behalf of these doctors as to plaintiff was placed before the jury, but that the jury was prohibited from quantifying the fault of these nonparties and their responsibility for plaintiff's injuries because this Court refused to place these nonparties on the jury verdict form. Defendants contend the recent Louisiana Supreme Court decision, *Keith v. United States Fidelity & Guarantee Co.*, 1997 WL 242555 (La. May 9, 1997), decided after judgment on this case but before defendants' amended motion for new trial, directs this Court to retroactively apply Louisiana's 1996 fault revisions, now clarifying the law and making it clear error for a Court to refuse to include on the jury verdict form nonparties such as the nonparty doctors.

This Court GRANTS permission for defendants to amend their Motion for New Trial. Motions for new trial pursuant to Fed. R. Civ. Pro. 59(a) must be filed within ten days of the entry of judgment. However, in the Fifth Circuit, "a trial court *may in the exercise of its sound discretion* allow a tardy amendment stating an additional ground for a new trial." *Dotson v. Clark Equipment Co.*, 805 F.2d 1225, 1228 (5th Cir. 1986) (emphasis in original). This Court will allow defendants to amend their Motion for New Trial so as to assert this additional ground, considering the overall balance of justice in this case, as the Louisiana Supreme Court did not reach a decision in *Keith* until May 9, 1997.

This Court further finds defendants are entitled to a new trial and GRANTS defendants' Motion for New Trial. In light of the decision in *Keith, supra* it was error not to include the nonparty doctors on the jury verdict form. As stated by the Louisiana Supreme Court in *Keith*, "[in the 1996 Extraordinary Legislative Session, the Legislature enacted Act 3, approved April 16, 1996, amending La. Civ. Code art. 2323 to provide as follows":

> A. In any action for damages where a person suffers injury, death, or loss, the degree of percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as a result partly of his own

> negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.
>
> B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal document or theory of liability, regardless of the basis of liability.
>
> C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tort feasor, his claim for recovery of damages shall not be reduced.

In *Keith*, the Louisiana Supreme Court stated that the holdings in *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So.2d 975 (La. 1995), regarding quantification of fault were no longer applicable in light of the "clear pronouncement from the Legislature" in the 1996 legislation quoted above. The Court in *Keith* also concluded "that the legislative changes reflected in Act 3 are procedural, and can be applied retroactively." Therefore, this Court erred in not including the nonparty doctors on the jury verdict form, and the defendants are therefore entitled to a new trial on all of plaintiff's state and federal claims to correct this substantial injustice.

As detailed by this Court in the Judgment, the jury awarded a single amount of damages for both plaintiff's federal and state law claims. In order to properly quantify fault and responsibility for injury, the jury must hear

all of the evidence and weigh it anew. Consequently, a new trial on the state law claims or damages alone would be insufficient.

Furthermore, this Court notes the Fifth Circuit has issued an *en banc* decision which clarifies this Court's inquiry as to the potential liability of Defendants Lemaire and Trahan as policymakers. In *Scott v. Moore*, 1997 WL 268575 (5th Cir. May 20, 1997) (*en banc*), the Fifth Circuit affirmed a grant of summary judgment to a municipality upon a pretrial detainee's § 1983 inadequate staffing claim. This *en banc* decision vacated a panel ruling reversing the grant of summary judgment. *Scott v. Moore*, 85 F.3d 230 (5th Cir.), *vacated for reh'g en banc*, 85 F.3d 240 (5th Cir. 1996). In so ruling, the *en banc* court stated:

> Hence, where a detainee complains of the number of bunks in a cell or his television or mail privileges, the wrong of which the detainee complains is a general condition of confinement. In such cases, the reasonable relationship test of *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), is apposite, as we may safely assume, by the municipality's very promulgation and maintenance of the complained-of condition, that it intended to cause the alleged constitutional deprivation. *See* [*Hare v. City of Corinth*, 74 F.3d 633, 645 (5th Cir. 1996) (*en banc*)] ("Only with such intentionality as a given is the [*Wolfish*] test useful."). Under *Wolfish*, 441 U.S. at 539, 99 S.Ct. at 1874, a constitutional violation exists only if we then find that the condition of confinement is not reasonably related to a legitimate, non-punitive governmental objective. *See Hare*, 74 F.3d at 640.

> In contrast, where the complained-of harm is a particular act or omission of one or more officials, the action is characterized properly as an "episodic act or omission" case and is not amenable to review under the *Wolfish* test. *See Hare*, 74 F.3d at 654. In an "episodic act or omission" case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission.

This clarification of the law further argues for a new trial. Consequently, the parties are to be guided by *Scott* in the future.

Attorney's Fees

Finally, defendants challenge this Court's award of attorney's fees to the plaintiff, contending they are entitled to a new trial, or, in the alternative, a reduction of the award for attorney's fees. Defendants argue plaintiff did not begin to expend attorney time in pursuit of the civil rights claim until February 29, 1996. This Court has already addressed this argument in its Judgment of March 6, 1997, and hereby ADOPTS the reasoning underlying its award of attorney's fees in said Judgment as to that issue. However, as this Court now GRANTS a new trial on the underlying claims the issue of attorney's fees must also be revisited. Attorney's fees can only be awarded if the plaintiff prevails under the law. It remains to be seen whether plaintiff will prevail under the law in the new trial. The judgments granted within the context

of the original trial are vacated and therefore there is no prevailing party. To grant attorney's fees at this juncture would be in violation of the law. Therefore, defendants' motion is GRANTED to the extent that no award of attorney's fees will be made until new trial is held and it is determined that plaintiff has or has not prevailed under the law.

Conclusion

Defendants Lemaire's, Trahan's, and Nolan's, original motions for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50, or in the alternative, are hereby DENIED for reasons given upon initial ruling. Defendants' Motion for New Trial on Damages, or, in the Alternative, Remittitur, is also DENIED for reasons given within this ruling. As Defendant Trahan has stated that his Motion to Dismiss on the basis of prescription should only be granted in the event that this Court grants Sheriff Lemaire's Motion for Judgment as a Matter of Law on plaintiff's official capacity claims against Lemaire, Defendant Trahan's Motion to Dismiss is DENIED.

Defendants' Motion to Amend its Motion for New Trial is GRANTED. Defendants' Amended Motion for New Trial is GRANTED.

Defendants' Motion as to attorney's fees is GRANTED to the extent that this Court is granting a new trial upon all of plaintiff's claims and therefore attorney's fees can only be awarded if plaintiff prevails on his civil rights claims in the new trial. This Court's Judgment of March 6, 1997 is VACATED.

The parties are to contact this Court within ten days of the date of this ruling in order to schedule the new trial.

THUS DONE AND SIGNED this 19 day of June, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

COPY SENT

DATE 6-19-97

BY ms

TO Lambert

Calogero

Matthews

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LALFAYETTE/OPELOUSAS DIVISION

JAMES J. SIBLEY, SR.

VERSUS

SHERIFF RAYWOOD LEMAIRE, ET AL

CIVIL ACTION NUMBER: 90-2573

JUDGE DOHERTY

MAGISTRATE JUDGE METHVIN

ORDER

(Filed June 19, 1997)

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants Lemairels, Trahan's, and Nolan's, original motions for judgment as a matter of law pursuant to Fed. R. Civ. Pro. 50, or in the alternative, are hereby DENIED for reasons given upon initial ruling. Defendants' Motion for New Trial on Damages, or, in the Alternative, Remittitur, is also DENIED for reasons given within this ruling. As Defendant Trahan has stated that his Motion to Dismiss on the basis of prescription should only be granted in the event that this Court grants Sheriff Lemaire's Motion for Judgment as a Matter of Law on plaintiff's official capacity claims against Lemaire, Defendant Trahan's Motion to Dismiss is DENIED.

Defendants' Motion to Amend its Motion for New Trial is GRANTED. Defendants' Amended Motion for New Trial is GRANTED. Defendants' Motion as to attorney's fees is GRANTED to the extent that this Court is granting a new trial upon all of plaintiff's claims and

therefore attorney's fees can only be awarded if plaintiff prevails on his civil rights claims in the new trial. This Court's Judgment of March 6, 1997 is VACATED.

Lafayette, Louisiana this 19 day of June, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

COPY SENT

DATE 6-19-97

BY ms

TO Lambert

Matthews

Calogero

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LALFAYETTE/OPELOUSAS DIVISION

JAMES J. SIBLEY, SR.	*	CIVIL ACTION NUMBER:
VERSUS	*	90-2573
	*	
RAYWOOD J. LEMAIRE,	*	JUDGE DOHERTY
ET AL	*	MAGISTRATE JUDGE
	*	METHVIN

MEMORANDUM RULING

(Filed Mar 10, 1998)

Pending for determination is the Motion for Summary Judgment filed by the defendants on September 26, 1997.[1] Defendants, Sheriff Raywood J. Lemaire, Chief Deputy Hubert Trahan, and Deputy Freddie Nolan, seek a judgment as a matter of law dismissing this action in its entirety with prejudice. The motion is opposed. Both plaintiff and defense counsel rely upon the sworn testimony and exhibits admitted during the trial of this matter conducted September 16-26, 1996 to support and oppose the pending Motion for Summary Judgment.[2]

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[1] Motion for Summary Judgment, Document No. 164; Plaintiff's Opposition Memorandum, Document No. 169.

[2] A new trial was granted pursuant to F.R.Civ.P. 59 by Memorandum Ruling entered June 1997 (Document No. 138) based on *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180 (La. 1997) and *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997) (*en banc*), both of which issued after judgment was entered, but before defendants' Amended Motion for a New Trial. See Memorandum Ruling (Document No. 138) for detailed reasons supporting the grant of a new trial.

SUMMARY JUDGMENT STANDARD

Rule 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material facts and that the moving party is entitled to summary judgment as a matter of law." The party seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case, and after a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Coleman v. Houston Indep. School Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

SUMMARY OF PERTINENT FACTS

Plaintiff, James J. Sibley, Sr. ("Sibley") gouged his own eyes out at around 9:30 p.m. on November 27, 1989, while a pretrial detainee in the Vermilion Parish Correctional Center ("VPCC"), after having been detained at VPCC since approximately 8:00 p.m. on November 22, 1989. Sibley was arrested at his home on November 22, 1989 at approximately 7:19 p.m. on charges of aggravated assault and simple battery. The Sibley family had contacted the Vermilion Parish Sheriff's office for assistance because Mr. Sibley's behavior had become extremely bizarre, and he had exhibited violence when he pushed his father-in-law down into a chair. Deputy Loren Abshire and Lieutenant Langlinais advised the family that they could take Mr. Sibley into custody on criminal charges, and that Mr. Sibley would be checked by Dr.

Ardley Hebert, who could make arrangements thereafter for appropriate psychiatric treatment. The family agreed to press charges, but indicated the charges would be dropped later. Sibley had been under treatment of psychiatrist, Dr. Thomas Latour, since April 1988, and had most recently seen Dr. Latour on November 8, 1989, at which time Dr. Latour had prescribed anti-depressants and tranquilizers. Sibley had ceased taking the medication and his behavior had become extremely bizarre, including such activities as climbing on the roof of his house with his children and praying loudly, and obsessively cleaning his home.

Sibley was arrested and booked into custody at VPCC at approximately 8:00 p.m. on November 22, 1997 without any resistance. The booking documents note that he was to be checked by Dr. Hebert on the following day, November 23, 1989. During either the evening of November 22 or early morning of November 23, 1989, Sibley, who had been placed in the holding cell near the jailer's office, which is a public area, disrobed and masturbated, following which he was transferred to isolation cell no. 2 where he remained until the self-mutilation which occurred on November 27, 1989. The isolation cell is around a corner from the jailer's office, and any prisoner maintained there can only be observed through a small opening in the door. The testimony concerning the frequency of the checks on Sibley during his incarceration varied from once every 15 minutes, to once every 30-40 minutes, to once every hour.

On November 23, 1989, Dr. Ardley Hebert examined Sibley at VPCC, noted that Sibley was "crazy", and indicated that he was going to pursue placement of Sibley at

the Acadiana Mental Health Center, but no bed was available at that time. On November 24, 1989, Nurse Louis Touchet examined Sibley and determined that Sibley's condition required further medical attention, and contacted Dr. Bryan Amy, who was taking calls for Dr. Hebert.

Dr. Amy examined Sibley at the VPCC at approximately 1:00 p.m. on Friday, November 24, 1989. Sibley refused to answer questions noting that Dr. Amy was from the coroner's office and that "coroners only examine dead people and I'm not dead." Dr. Amy prepared a coroner's emergency certificate[3], and noted therein that Sibley was on the "waiting list" at Acadiana Mental Health Center. On the form, Dr. Amy checked off the section indicating that Sibley was "dangerous to others", but left the section indicating that he may be "dangerous to self" unchecked. Dr. Amy's notes[4] state that on his arrival, Sibley "was pacing around his cell reading an upside-down Bible with photographs lined up on the bed like he was holding services." Dr. Amy's notes further state that it was reported to him that Sibley "had taken off all of his clothes this morning and was masturbating and becoming unruly." Dr. Amy's notes conclude by stating that Dr. Amy has signed a PEC and the plan is to keep him in jail for seventy-two (72) hours or until he can transfer to Acadiana Mental Health." Neither Dr. Hebert nor Dr. Amy prescribe any medication for Sibley, nor did either instruct the personnel at UPCC [sic] to handle

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[3] Admitted at trial as Plaintiffs Exhibit 9.

[4] Dr. Amy's notes were admitted as Plaintiff's Exhibit 10 at trial.

Sibley in any manner different from that which the doctors observed at their visit nor did either instruct the VPCC not to place Sibley in an isolation cell or to move him from the isolation cell. Neither indicated any special or extraordinary treatment need be given to Sibley due to his medical condition.

Thereafter, on Sunday, November 26, 1989, Sibley created a disturbance at approximately 12:45 p.m. by beating and kicking on the door to his cell. Sibley ignored requests to stop, and Deputy Freddie Nolan made the decision to shackle Sibley to his bed. Deputy Nolan's decision was motivated either by a desire to protect Sibley from self-harm or a desire to prevent Sibley from causing any further disturbances, or both. Sibley was shackled to his bed by his leg only. He remained shackled for an undetermined period of time, but arguably through 9:30 p.m. on Monday, November 27, 1989. The testimony concerning the duration of his shackling was inconsistent. Between Thursday, November 23, and Monday, November 27, 1989, Sibley was observed by various deputies reading his Bible upside down, staring at an overhead light, putting his head into the toilet and staring into the water, wiping down his cell with toilet paper and lining the cell with toilet paper, and chanting.

At approximately 5:30 p.m. on Monday, November 27, 1989, Sibley threw his food tray and urinated on himself. He was removed from the cell so that the cell could be cleaned, and was stripped of his clothing at that time. When asked whether he wanted to take a shower, Sibley expressed fear that the devil was coming out of the drain to get him. After the cell was cleaned, Sibley was shackled to the bed again by his leg.

A shift change occurred at approximately 6:00 p.m. on the evening of November 27, 1989. At approximately 9:30 p.m., Deputy Lemoine found Sibley in the process of gouging his eyes out. Deputy Lemoine testified that he had checked Sibley 15 minutes earlier and that Sibley was okay at that time. Deputy Peters contacted Dr. Bryan Amy at approximately 9:45 p.m. Patrol Deputy Bourque arrived at VPCC at approximately 9:56 p.m. Sibley was clothed in a jumpsuit and cuffed for transport to Abbeville General Hospital and the deputies departed VPCC at approximately 10:22 p.m. Dr. Robert Young, an ophthalmologist, examined Sibley at Abbeville General that night, but did not perform surgery until several days later. Neither Dr. Young nor any other witness testified that the damage to Sibley's eyes was aggravated by the fifty-two minute delay in transport from VPCC to the hospital.

Sibley is totally blind as a result of the incident. Sibley advised Dr. Latour afterwards that God had told him to pluck his eyes out. Dr. Latour testified that Sibley was suffering a "psychotic episode" and that an individual could not inflict the self-mutilation which Sibley inflicted unless he was psychotic. Dr. Robert Blanche, a psychiatrist, testified that self-mutilation is difficult to prevent, even when you know that it is a risk. Dr. Blanche further testified that the only advance indicators that a psychotic person is likely to harm themselves through self-mutilation include either a history of self-mutilation or a direct statement from the person that they intend to do harm to themselves.

SUMMARY OF PENDING CLAIMS

Plaintiff filed an outline of his current claims on August 25, 1997.[5] Plaintiff asserts claims against Deputy Freddie Nolan and Chief Deputy Hubert Trahan in their individual capacity for their actions and in-actions, failure to properly supervise deputies under their command, alleging that these resulted in the deprivation of plaintiff's right to reasonable medical treatment and protection from self-harm and the right not to be subjected to excessive force in the form of prolonged shackling.[6] Plaintiff further asserts a claim against Chief Deputy Hubert Trahan, in his official capacity, based on official policies of the VPCC permitting isolation and shackling of mentally ill pretrial detainees, which allegedly resulted in deprivations of plaintiff's right to reasonable medical treatment and protection from self-harm. Plaintiff further asserts a claim against Sheriff Raywood Lemaire in his official capacity based on the official policies of the VPCC permitting isolation and shackling of mentally ill pretrial detainees.[7] All of the foregoing claims are asserted under

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[5] Document No. 151.

[6] The claim of excessive force in the form of prolonged shackling was not pursued as an independent claim, but as part and parcel of plaintiff's claim for violation of the right to protection from self-harm. See Plaintiff's Statement of Material Facts, excerpted herein at page 12, Number 2 and 3. As plaintiff's only claimed injury is the self-inflicted eye mutilation, the claim of excessive force by means of prolonged shackling is subsumed within the claim for protection from self-harm.

[7] No official capacity claim is being asserted on the grounds of excessive shackling per se, or failure to train." See footnotes 4 and 5, Plaintiff's Outline of Claims, Document No. 151.

42 U.S.C. 1983. In addition, plaintiff asserts negligence claims on his own behalf, and on behalf of his minor son, James J. Sibley, Jr., under Louisiana law against Deputy Freddie Nolan, Chief Deputy Hubert Trahan and Sheriff Raywood Lemaire.

ANALYSIS OF CLAIMS UNDER 42 U.S.C. 1983 AND U.S. CONSTITUTION

The rights of a pretrial detainee flow from the due process guarantees of the Fourteenth Amendment, and the liability of prison officials to pre-trial detainees is assessed under *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (*en banc*). The applicable standard is further elucidated in *Scott v. Moore*, 114 F.2d 51, 54 (5th Cir. 1997) (*en banc*), and is well summarized in the Fifth Circuit's most recent opinion on the subject, *Flores v. County of Hardeman*, 124 F.3d 736, 737 (5th Cir. 1997) (reh'g denied Nov. 17, 1997, DN 96-11103), as follows:

> "[1] To determine the appropriate standard to apply in analyzing constitutional challenges by pretrial detainees, we must first classify the challenge as an attack on a 'condition of confinement' or as an 'episodic act or omission.' *Hare v. City of Corinth*, 74 F.3d 633, 644 (5th Cir. 1996). A 'condition of confinement case' is a constitutional attack on 'general conditions, practices, rules, or restrictions of pretrial confinement.' *Id.* In such cases we may assume, by the municipality's promulgation and maintenance of the complained of condition, that it intended to cause the alleged constitutional deprivation. *Id.* at 645.

> [2][3] However, if the complained-of harm is a particular act or omission of one or more officials, the action is characterized as an 'episodic act or omission' case. See *Hare* 74 F.3d at 645. In an episodic act or omission case, an actor is usually interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom or rule (or lack thereof) of the municipality that permitted or caused the act or omission. The detainee in such a case must establish that the official(s) acted with subjective deliberate indifference to prove a violation of his constitutional rights. *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (*en banc*). To succeed in holding a municipality accountable for such a violation, the detainee must show that the municipal employee (1) violated his clearly established constitutional rights with subjective deliberate indifference and (2) the violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference. *Id.*, citing *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (emphasis added).

Counsel have stipulated that the actions and omissions of Chief Deputy Trahan and Deputy Nolan were episodic in nature.[8] This stipulation is well supported by the facts and the law, and would have been the finding of the court absent the stipulation of the parties. Sibley is clearly an episodic event case under the reasoning of *Hare*, *Scott* and *Flores*. Here the complained-of-harm

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[8] See Minutes of Court, dated September 24, 1996, Document No. 69.

includes the actions and omissions of the named defendants, and other jail officials, including, most significantly, the placement of Sibley in isolation where he could not be continuously observed, the prolonged shackling of Sibley, the failure to monitor Sibley constantly, and the failure to contact Drs. Hebert or Amy again following Dr. Amy's visit on Friday, despite Sibley's deteriorating behavior. The policy violations alleged, including the shackling of mentally ill persons, the failure to maintain a "safe cell" where mentally ill detainees could be kept under constant observation, and the failure to train jail officials to recognize the signs and symptoms exhibited by seriously mentally ill persons, are in fact pointed to only derivatively.

DEFINITION OF SUBJECTIVE DELIBERATE INDIFFERENCE

A careful reading of *Hare* reflects that *Hare* adopted the *Farmer* standard of subjective deliberative indifference. *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The following language from *Hare* articulates the subjective deliberate indifference standard with great clarity:

> "[W]e find that the *Farmer* formulation of the deliberate indifference standard properly captures the essence of the inquiry as to whether a pretrial detainee has been deprived of his due process rights to medical care and protection from violence. The *Farmer* standard of subjective 'deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability.' 511 U.S. at ___, 114 S.Ct. at 1981; see also id. at ___, 114 S.Ct. at 1979

('[A]n official's failure to alleviate a significant risk that he should have perceived but did not- . . . cannot under our cases be condemned as the infliction of punishment.'). Thus, the *Farmer* test purports to distinguish between errant inaction and infliction of punishment: Punishment is inflicted only when a prison official was aware of a substantial risk of serious harm to a convicted inmate but was deliberately indifferent to that risk.

The response demanded of jail officials with actual knowledge of such risk of serious injury is that he not act with deliberate indifference. We share the concern of the Seventh Circuit that the *Farmer* standard not be transmuted into a negligence inquiry. 'Deliberate indifference, i.e., the subjective intent to cause harm, cannot be inferred from a prison guard's failure to act reasonably. If it could, the standard applied would be more akin to negligence than deliberate indifference.' *Id.*" (citations and footnotes omitted) *Id.* at 649.

"We are urged to downshift the *Farmer* standard from the requirement that the official be subjectively aware of this risk of serious injury to an objective measure of 'should have been aware.' As we have explained, however, this objective standard offered for liability under the due process clause is redolent with negligence and its measures. That will not do."

Id. at 650.

"In sum, we hold (1) that the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic

> human needs, including medical care and protection from harm, during their confinement; and (2) that a state jail official's liability for episodic acts or omissions cannot attach unless the official had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk."

Id. at 650.

> "As we have explained, however, the correct legal standard is not whether the jail officers 'knew or should have known,' but whether they had gained actual knowledge of the substantial risk of suicide and responded with deliberate indifference."

Id. at 650.

CONTINUING LEGAL ANALYSIS OF FEDERAL CLAIMS

Therefore, the issue presented is not whether the defendants "knew or should have known", but rather, whether they had gained actual knowledge that Sibley was at substantial risk of self-mutilation, and responded with deliberate indifference. The standard places a demanding burden of proof on plaintiff. However, *Hare* analyzed and explained in considerable detail the reasons for adoption of the subjective, rather than objective, deliberate indifference standard, and *Scott* and *Flores* reflect the Fifth Circuit's adherence to this high standard.

In the case at hand, it is clear that Sibley was suffering a psychotic episode when he was arrested, and that his condition continued to deteriorate throughout the

period of incarceration. Hindsight, as usual, reveals several mechanisms which might have avoided this tragedy, including constant monitoring of Mr. Sibley, and/or an earlier administration of psychotropic drugs. Ideally, one of these mechanisms could have been used to avoid Sibley's tragedy; however, the ideal is not the standard this Court must apply. Nor may this Court allow its great sympathy for Mr. Sibley and/or true regret to supersede its duty to objectively apply the governing legal standard as articulated by the United States Fifth Circuit Court of Appeals. The specific legal issue presented is whether there is a genuine issue of material fact as to whether Chief Deputy Trahan and/or Deputy Nolan were aware Sibley posed a substantial risk of self-mutilation, but were deliberately indifferent to that risk.

Plaintiff filed a Statement of Material Facts as to Which There Exists a Genuine Issue to be Tried on October 10, 1997.[9] This list of issues is incorporated below for ease of reference.

> 1. Whether or not plaintiff's behavior became increasingly demonstrative and bizarre during his incarceration at the Vermilion Parish Correctional Center.
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> 2. Whether or not plaintiff was shackled for an extended period of time in response to his increasingly demonstrative and bizarre behavior during his incarceration at the Vermilion Parish Correctional Center.

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[9] Plaintiff's Statement of Material Facts as to Which There Exists a Genuine Issue to be Tried, Document No. 170.

3. Whether or not prolonged shackling increased plaintiff's agitation during his incarceration at the Vermilion Parish Correctional Center.

4. Whether [sic] not Chief Deputy Hubert Trahan knew that plaintiff's behavior was becoming increasingly demonstrative and bizarre during his incarceration at the Vermilion Parish Correctional Center.

5. Whether or not a bed became available at Acadiana Mental Health Center during the time of plaintiff's incarceration at the Vermilion Parish Correctional Center.

6. Whether or not there were alternative treatment facilities where appropriate medical treatment could have been obtained for plaintiff during his incarceration at the Vermilion Parish Correctional Center.

7. Whether or not Dr. Brian Amy would have prescribed other medical treatment or interventions, if he had been called and informed that plaintiff's behavior was becoming increasingly demonstrative and bizarre.

8. Whether or not there was an official policy instituted and maintained by Sheriff Raywood Lemaire and Chief Deputy Hubert Trahan, which permitted mentally ill pretrial detainees to be placed in isolation.

9. Whether or not there was an official policy instituted and maintained by Sheriff Raywood Lemaire and Chief Deputy Hubert Trahan, which permitted mentally ill pretrial detainees to be shackled.

10. Whether or not Sheriff Raywood Lemaire and Chief Deputy Hubert Trahan were aware of risks to inmates resulting from isolation and shackling of mentally ill pretrial detainees, which would result in a deprivation of their constitutional rights to reasonable medical care and protection from self-harm.

11. Whether or not it was foreseeable that plaintiff would suffer a self-inflicted injury.

12. Whether or not Chief Deputy Hubert Trahan had knowledge that plaintiff would suffer a self-inflicted injury, such as gouging out his eyes.

13. Whether or not Deputy Freddie Nolan had knowledge that plaintiff would suffer a self-inflicted injury, such as gouging out his eyes.

14. Whether or not plaintiff was provided reasonable medical care and protection from self-harm during his incarceration at the Vermilion Parish Correctional Center.

15. Whether or not plaintiff was observed every 15 minutes, every 20 to 30 minutes, hourly, or not according to any particular schedule during his incarceration at Vermilion Parish Correctional Center.

16. Whether or not periodic observations of plaintiff were adequate protection against the risk of self-inflicted harm.

17. Whether or not the Vermilion Parish Correctional Center should have been equipped with a medical holding facility from which plaintiff could have been continuously observed.

18. Whether or not more prompt intervention could have prevented some of the self-inflicted damage to plaintiff's eyes.

19. Whether or not more prompt transportation of plaintiff to a medical treatment facility following the incident might have prevented some of the damage to plaintiff's eyes.

20. Whether or not more prompt transportation of plaintiff to a medical treatment facility following the incident might have reduced his personal pain and suffering.

(Bold added)

Of these disputed factual issues, only two relate directly to the dispositive issue pending before this Court, and they are set forth as numbers 12 and 13.

Under the harsh light of the objective judicial analysis required, certain actions and omissions of the defendant officials may be interpreted as negligent, or perhaps even grossly negligent; however, *Hare* observed explicitly that even gross negligence does not amount to subjective deliberate indifference. *Hare*, 74 F.3d at 644, 45. Hindsight makes it much clearer that Sibley should not have been shackled for an extended period of time, perhaps should not have been isolated with limited view by monitoring officials, that Dr. Amy perhaps should have been called when Sibley's condition seemed to deteriorate over the weekend, etc. Yet, none of these actions or inactions establish Trahan or Nolan had *actual knowledge* Sibley had become a substantial risk of self-mutilation. As noted earlier, according to Dr. Robert Blanche's trial testimony, self-mutilation is difficult to anticipate even with the

education, knowledge and experience of a psychiatrist.[10] Indeed, Dr. Blanche testified the only two indicators a person is at risk are: (1) a history of self-mutilation; or (2) a statement from the person that they intend to self-mutilate. Neither existed here; nether Trahan nor Nolan had knowledge of either indicator.

The only evidence which might, arguably, have put the defendants on notice of Sibley's risk of self-mutilation was found within the testimony of Deputy Peters that another deputy had told him that Sibley was banging his head against the walls. However, the significance of this testimony is minimal as there was no evidence Sibley suffered bruises or lacerations or injuries to his head or any other part of his body, besides his eyes, at any time during his incarceration at VPCC and there is no evidence Trahan or Nolan had knowledge of this event. Thus, Deputy Peter's testimony concerning a hearsay remark of another deputy alone does not rise to the requisite level to create a *genuine issue* of material fact as to whether Trahan and/or Nolan knew Sibley was at a substantial risk of self-mutilation.

Further, numbers 18 through 20 of plaintiff's list of genuine issues of material fact, and raises the issue of the effects of the delay between the eye gouging incident and Sibley's transportation to a medical treatment facility. Items 18 through 20 are restated below for ease of reference:

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[10] Dr. Robert Blanche's trial testimony.

18. Whether or not more prompt intervention could have prevented some of the self-inflicted damage to plaintiff's eyes.

19. Whether or not more prompt transportation of plaintiff to a medical treatment facility following the incident might have prevented some of the damage to plaintiff's eyes.

20. Whether or not more prompt transportation of plaintiff to a medical treatment facility following the incident might have reduced his personal pain and suffering.

Framed in the language of *Hare, Scott* and *Flores,* the issue presented is whether the jail officials knew the delay in transport would cause damage to Sibley, physical and/or mental, and armed with that knowledge, acted with deliberate indifference by intentionally delaying the transport. Again, the evidence does not rise to the requsite [sic] level to create a genuine issue of material fact. The transport was delayed less than an hour, and the evidence established that Deputy Peters subjectively believed that he needed to contact Dr. Amy before transporting Sibley to Abbeville General Hospital. No evidence was presented that Lemaire, Nolan or Trahan know [sic] of the delay, and ratified the delay with knowledge the delay would cause damage to Sibley. Again, at best, the deputies' actions might constitute negligence, but do not reflect subjective deliberate indifference on the part of Lemaire, Nolan or Trahan as required by *Hare, Scott* and *Flores.* In any event, there is no evidence the delay aggravated the damage that had already been done to Sibley's eyes.

Although plaintiff's argument and analysis is not without merit and strikes a resonant chord with the argument and analysis made by four esteemed Fifth Circuit jurist, this Court is bound to recognize that the argument and analysis urged is found within the DISSENT in the *Scott*, and *Moore* decisions, and as such, cannot control this court's decision. Rather, this Court is bound by the majority decision in its interpretation of *Hare* and *Farmer*, and as such this Court concludes a genuine issue of material fact does not exist concerning whether Chief Deputy Hubert Trahan and/or Deputy Freddie Nolan acted with subjective deliberate indifference towards the constitutional rights of James Sibley, Sr. Having reached this conclusion, it is not necessary to evaluate the second prong of the standard, *i.e.* as to whether the constitutional violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference.

It is noted there was no evidence Sheriff Lemaire had any personal involvement or personal knowledge of the events which transpired at VPCC between November 22 and November 27, 1989 at the time that they occurred. Thus, he could not have acted with subjective deliberate indifference to Sibley's constitutional rights.

LOUISIANA NEGLIGENCE CLAIMS

Having concluded that the plaintiff's 1983 claims are subject to dismissal as a matter of law, the Court must determine whether it will exercise supplemental jurisdiction over the pendent state law claims. Here it is significant that plaintiff filed negligence claims arising out of

the pertinent events in state court commensurate with the filing of this action in federal court, and said claims remain pending in Vermilion Parish, having been stayed in March 1996 pending the outcome of these proceedings.[11] In addition, 28 U.S.C. 1367(c)(3) states, "[t]he district court may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction . . . " Under the circumstances and the law, this Court elects not to exercise supplemental jurisdiction over the remaining state law claims, but will instead dismiss same without prejudice so that they may be pursued in the pending state court proceedings. See *Flores*, 124 F.2d at 739. (Fifth Circuit held district court's decision to dismiss plaintiff's state law claims was not error where all federal claims had been dismissed by summary judgment).

ATTORNEY'S FEES

Because plaintiff is not a "prevailing party" under 42 U.S.C. 1988, plaintiff's claim for attorney's fees thereunder will be **DISMISSED WITH PREJUDICE**.[12]

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[11] James Sibley, Sr., et al v. Vermilion Parish Police Jury, et a], 15th Judicial District Court, Vermilion Parish, Docket No. 90-58584.

[12] The disposition of the Motion for Summary Judgment renders the remaining pending, motions, including the Motion to Strike Insufficient Defense (Document 148) and the Motion to Dismiss (Document 166), and the Motion for Partial Summary Judgment (Document 174), moot.

Signed this 9 day of March, 1998 at Lafayette, Louisiana.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

JAMES J. SIBLEY, SR.	CIVIL ACTION NO. 90-2573
VERSUS	
RAYWOOD J. LEMAIRE, ET AL	JUDGE DOHERTY
	MAGISTRATE JUDGE METHVIN

JUDGMENT OF DISMISSAL

(Filed March 10, 1998)

For reasons assigned within the Memorandum Ruling entered this date;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' Motion for Summary Judgment is **GRANTED,** that all claims asserted in this action under 42 U.S.C. 1983, and the United States Constitution, are **DENIED** as a matter of law and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims asserted herein under Louisiana law are **DISMISSED WITHOUT PREJUDICE,** pursuant to 28 U.S.C. 1367(c)(3), reserving plaintiff's rights to pursue these claims in the pending state court proceedings.

FINALLY, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's claims for attorney's fees under 42 U.S.C. 1988 are **DENIED** as a matter of law and **MISSED WITH PREJUDICE.**

Signed this 9 day of March, 1998 at Lafayette, Louisiana.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

JUDGEMENT ENTERED March 11, 1998

BY Suzanne Mitchell

COPY TO Joy
Lambert
Matthews
Calogero

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30301

JAMES J SIBLEY, SR

Plaintiff – Appellant-Cross-Appellee

v.

RAYWOOD J LEMAIRE, Sheriff;
HUBERT P TRAHAN; FREDDIE NOLAN

Defendants – Appellees-Cross-Appellants

Appeals from the United States District Court for the Western District of Louisiana, Lafayette

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/24/99, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court

and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

Judge Smith did not participate in the consideration of the petition for rehearing en banc.
